

United States  
6  
Circuit Court of Appeals  
For the Ninth Circuit.

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EDWARD DONLAN and BEN W. HENDERSON,  
Copartners, Doing Business Under the Firm  
Name and Style of DONLAN and HENDER-  
SON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-  
PANY, a Corporation, of Jackson County,  
Missouri,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
District of Montana.

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FILED

APR 1 - 1922

F. D. MONCKTON,  
CLERK.



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Circuit Court of Appeals  
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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Additional Memorandum Decision.....	124
Affidavit of Ruby Brome.....	111
Amended Answer .....	19
Assignment of Errors.....	410
Bond on Appeal.....	414
Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.....	421
Citation .....	417
Complaint .....	2
Decision .....	112

## DEPOSITIONS ON BEHALF OF DEFEND- ANT:

DALY, O. R.....	332
DE VEUVE, EARL.....	306
PARTRIDGE, FRANK E.....	319

## EXHIBITS:

Exhibit "A" Attached to Complaint—Con- tract Dated April 16, 1920, Between Donlan & Henderson and Turner, Den- nis & Lowry Lumber Company.....	15
Plaintiffs' Exhibit No. 1—Bill of Sale Dated April 16, 1920, Donlan & Hen-	

	Index.	Page
EXHIBITS—Continued:		
derson and Turner, Dennis & Lowry Company .....		135
Plaintiffs' Exhibit No. 7—Letter Dated November 17, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson .....		158
Plaintiffs' Exhibit No. 8—Bill of Particu- lars .....		174
Plaintiffs' Exhibit No. 9—Bill of Particu- lars .....		185
Plaintiffs' Exhibit No. 10—Bill of Particu- lars .....		190
Plaintiffs' Exhibit No. 11—Letter Dated November 4, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson .....		257
Plaintiffs' Exhibit No. 12—Advertisement Appearing in "The Retail Lumber- man" .....		259
Plaintiffs' Exhibit No. 13—Proof of Loss and Apportionment of Insurance ..		356
Defendant's Exhibit "A" Attached to Affi- davit of Earl De Veuve—Letter Dated June 25, 1920, Inter-Insurance Ex- change to Donlan & Henderson.....		311
Defendant's Exhibit "A" Attached to Deposition of Frank E. Partridge— Inventory Dated April 1, 1920.....		327
Defendant's Exhibit "B"—Letter Dated		

EXHIBITS—Continued:

July 28, 1920, Inter-Insurance Exchange to Donlan & Henderson.....	312
Defendant's Exhibit "C"—Letter Dated July 6, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson .....	146
Defendant's Exhibit "C" Attached to Deposition of O. R. Daly—Statement of Loss .....	331
Defendant's Exhibit "D"—Letter Dated November 27, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson .....	148
Defendant's Exhibit "D" Attached to Deposition of O. R. Daly—Letter Dated August 17, 1920, Donlan & Henderson to Frank E. Partridge.....	332
Defendant's Exhibit "E"—Statement of Account Rendered Donlan & Henderson .....	152
Defendant's Exhibit "E" Attached to Deposition of Earl De Veuve—Sworn Statement in Proof of Loss, Edward Donlan and Ben W. Henderson to Inter-Insurance Exchange of Seattle, Wash. ....	316
Defendant's Exhibit "F"—Letter Dated August 30, 1920, Ben W. Henderson to Mr. Thos. S. Dennis.....	155
Defendant's Exhibit "F"—Sworn State-	

	Index.	Page
EXHIBITS—Continued:		
ment in Proof of Loss, Edward Donlan and Ben W. Henderson to Inter-Insurance Exchange of Seattle, Wash.....		317
Defendant's Exhibit "G"—Letter Dated June 22, 1920, Turner, Dennis & Lowry Lumber Co. to Donlan & Henderson..		166
Defendant's Exhibit "H"—Letter Dated July 2, 1920, Turner, Dennis & Lowry Lumber Co. to Donlan & Henderson..		166
Defendant's Exhibit "I"—Letter Dated July 24, 1920, Donlan & Henderson to Turner, Dennis & Lowry Lumber Co..		168
Defendant's Exhibit "P"—Supplemental Contract Dated June 28, 1920, Between Donlan & Henderson and Turner, Dennis & Lowry Lumber Company.....		213
Defendan's Exhibit "Q"—Letter Dated May 17, 1920, Turner, Dennis & Lowry Lumber Company to Sam W. Henderson .....		217
Defendant's Exhibit "R"—Letter Dated June 9, 1920, Turner, Dennis & Lowry Lumber Company to Ben Henderson .....		218
Defendant's Exhibit "S"—Letter Dated June 10, 1920, Donlan & Henderson to Turner, Dennis & Lowry Lumber Company .....		219
Defendant's Exhibit "T"—Letter Dated June 17, 1920, Turner, Dennis & Lowry Company to Donlan & Henderson....		219

EXHIBITS—Continued:

Defendant's Exhibit "U"—Letter Dated June 16, 1920, Donlan & Henderson to Turner, Dennis & Lowry Lumber Com- pany .....	221
Defendant's Exhibit "V"—Letter Dated June 18, 1920, Donlan & Henderson to Turner, Dennis & Lowry Lumber Com- pany .....	221
Defendant's Exhibit "W"—Letter Dated June 25, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Hender- son .....	222
Defendant's Exhibit "X"—Letter Dated June 30, 1920, Donlan & Henderson to Lowry Lumber Company to Donlan & pany .....	223
Defendant's Exhibit "Y"—Letter Dated August 3, 1920, Donlan & Henderson to Thos. S. Dennis.....	224
Defendant's Exhibit "Z"—Letter Dated August 12, 1920, Donlan & Henderson to Turner, Dennis & Lowry Lumber Company .....	226
Defendant's Exhibit No. 1—Statement of Account .....	232
Defendant's Exhibit No. 2—Telegram Dated October 28, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson.....	234

	Index.	Page
EXHIBITS—Continued:		
Defendant's Exhibit No. 3—Telegram Dated October 30, 1920, Donlan & Hen- derson to Turner, Dennis & Lowry Lumber Company .....		234
Defendant's Exhibit No. 14—Letter Dated December 7, 1920, Turner, Dennis & Lowry Lumber Company to onlan & Henderson .....		276
Defendant's Exhibit No. 15—Statement of Account Rendered Donlan & Hender- son .....		278
Defendant's Exhibit No. 18—Inventory of Donlan & Henderson, Dated June 6, 1920 .....		288
Defendant's Exhibit No. 19—Telegram Dated June 26, 1920, Turner, Dennis and Lowry Lbr. Company to L. X. Juneau .....		293
Defendant's Exhibit No. 20—Telegram Dated June 22, 1920, Turner, Dennis & Lowry Company to L. X. Juneau..		294
Defendant's Exhibit No. 21—Letter Dated November 17, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson .....		345
Defendant's Exhibit No. 22—Letter Dated December 15, 1920, Turner, Dennis & Lowry Lumber Company to Donlan & Henderson .....		346



EXHIBITS—Continued:

Defendant's Exhibit No. 23—Telegram Dated August 3, 1920, Donlan & Hen- derson to Turner, Dennis & Lowry Lumber Company .....	378
Defendant's Exhibit No. 24—Telegram Dated August 6, 1920, Donlan & Hen- derson to Turner, Dennis & Lowry Lumber Company .....	378
Judgment and Decree.....	125
Names and Addresses of Solicitors of Record..	1
Petition for Order Allowing Appeal.....	408
Praecipe for Transcript of Record on Appeal..	419
Reply .....	87
Statement of the Evidence.....	134

TESTIMONY ON BEHALF OF PLAIN-  
TIFFS:

DONLAN, ED .....	198
Recalled in Rebuttal.....	363
Cross-examination .....	375
Redirect Examination .....	378
DWIGHT, REUBEN (In Rebuttal).....	405
FLANAGIN, J. P.....	195
Cross-examination .....	196
Redirect Examination .....	198
GRAY, FRANK P. (In Rebuttal).....	387
HENDERSON, BEN W.....	135
Cross-examination .....	142
Cross-examination (Resumed).....	151
Redirect Examination .....	157
Recross-examination .....	165

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TUFF—Continued:		
Redirect Examination .....		169
Recross-examination .....		170
Recalled in Rebuttal.....		351
Cross-examination .....		359
Redirect Examination .....		362
Recross-examination .....		363
HOYT, R. R. (In Rebuttal).....		391
Cross-examination .....		392
Redirect Examination .....		392
Recross-examination .....		393
Recalled in Rebuttal.....		406
Cross-examination .....		406
KEITH, I. R. (In Rebuttal).....		393
LANSING, J. P.....		170
Cross-examination .....		172
Redirect Examination .....		174
Recross-examination .....		174
Recalled in Rebuttal.....		394
Cross-examination .....		396
Redirect Examination .....		397
LUBRECHT, W. C.....		179
Cross-examination .....		182
Redirect Examination .....		183
Recalled in Rebuttal.....		400
Cross-examination .....		401
MAHONEY, JOHN (In Rebuttal).....		406
Cross-examination .....		407
POLLEYS, E. H. (In Rebuttal).....		397
Cross-examination .....		399



Index.	Page
TESTIMONY ON BEHALF OF PLAIN- TUFF—Continued:	
Redirect Examination .....	399
Recross-examination .....	399
RAPP, WELLING (In Rebuttal).....	388
Cross-examination .....	391
Redirect Examination .....	391
RICHARDSON, C. H.....	184
Cross-examination .....	195
Recalled in Rebuttal.....	403
Cross-examination .....	404
VIOLETTE, A. J. (In Rebuttal).....	379
Cross-examination .....	386
TESTIMONY ON BEHALF OF DEFEND- ANT:	
CARTER, CHARLES .....	298
Cross-examination .....	301
Redirect Examination .....	302
Recross-examination .....	302
Re-redirect Examination .....	302
Recross-examination .....	303
DENNIS, THOMAS S.....	199
Cross-examination .....	249
Redirect Examination .....	265
Recross-examination .....	266
Recalled .....	338
Cross-examination .....	343
Redirect Examination .....	344
JUNEAU, LOUIS X.....	285
Cross-examination .....	296
Redirect Examination by Mr. Turpin.	297
Redirect Examination by Mr. Parsons.	298

	Index.	Page
TESTIMONY ON BEHALF OF DEFEND-		
ANT—Continued:		
Recalled .....		337
Cross-examination .....		337
LOVE, EDWARD .....		303
Cross-examination .....		305
LOWRY, G. H.....		271
Cross-examination .....		282
WEST, ALBERT RICHARD.....		266
Cross-examination .....		269

**Names and Addresses of Solicitors of Record.**

HARRY H. PARSONS, Esq., of Missoula, Montana,

A. J. VIOLETTE, Esq., of Missoula, Montana,  
Messrs. GUNN, RASCH & HALL, of Helena, Montana,

Solicitors for Plaintiffs and Appellants.

Messrs. HALL & POPE, of Missoula, Montana,  
REES TURPIN, Esq., of Kansas City, Missouri,

Solicitors for Defendant and Appellee.

[1\*]

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In the District Court of the United States in and  
for the District of Montana.

No. 892.

EDWARD DONLAN and BEN W. HENDER-  
SON, Copartners Doing Business Under the  
Firm Name and Style of DONLAN AND  
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson  
County, Missouri,

Defendant.

BE IT REMEMBERED, that on February 16th,  
1921, the plaintiffs filed their complaint herein,  
which complaint is in the words and figures fol-  
lowing, to wit: [2]

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDER-  
SON, Copartners Doing Business Under the  
Firm Name and Style of DONLAN AND  
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson  
County, Missouri,

Defendant.

### **Complaint.**

Come now the plaintiffs and for cause of action  
herein against the defendant, complain and allege:

1.

That at all of the times herein mentioned the  
plaintiffs were copartners in the business of deal-  
ing in manufacturing and selling lumber in the  
Counties of Flathead and Missoula, in this State,  
and doing business under the firm name and style  
of Donlan and Henderson.

2.

That at all of the times herein mentioned the  
defendant was, and still is, a corporation of the  
State of Missouri, which was at all of said times,  
and still is operating and doing business in this  
State, and engaged in handling, shipping and  
selling lumber in said counties.

3.

That the plaintiffs herein, between the 16th day of April, 1920, and the fifth (5th) day of August, 1920, sold and delivered to the defendant lumber of the reasonable, actual and market value of One Hundred and Forty-nine Thousand Four Hundred and Forty-seven and 22/100 (\$149,447.22) Dollars; that defendant received, accepted and took possession of said lumber; that defendant promised and agreed to pay the said reasonable price of, and for said lumber within a reasonable time from and after said delivery and acceptance. [3].

4.

That said reasonable time has now elapsed, the said sum and purchase price of said lumber is now due and owing, and is wholly unpaid save and except in the sum of Eighty-nine Thousand Four Hundred and Forty-seven and 24/100 (\$89,447.24) Dollars, thereby leaving a balance, due, owing and unpaid from the defendant to plaintiffs of Sixty Thousand (\$60,000.00) Dollars; that demand has been made therefor and payment has been and still is refused.

5.

WHEREFORE, plaintiffs pray judgment against the defendant for the sum of Sixty Thousand (\$60,000.00) Dollars, together with interest thereon at the rate of eight (8%) per cent per annum until paid.

COUNT NUMBER TWO.

Plaintiffs herein for a further, separate and second cause of action against the defendant, complains and alleges:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling lumber in the counties of Flathead and Missoula, in this State, and doing business under the firm name and style of Donlan and Henderson.

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That the plaintiffs herein, between the 16th day of April, 1920, and the fifth (5th) day of August, 1920, sold and delivered to the defendant lumber of the reasonable, actual and market value of One [4] Hundred and Forty-nine Thousand Four Hundred and Forty-seven and 22/100 (\$149,447.22) Dollars; that the defendant received, accepted and took possession of said lumber; that defendant promised and agreed to pay the said reasonable price of, and for said lumber within a reasonable time from and after said delivery and acceptance.

4.

That said reasonable time has now elapsed, and said sum and purchase price of said lumber is now due and owing, and is wholly unpaid save and except in the sum of Eighty-nine Thousand Four Hundred Forty-seven and 24/100 (\$89,447.24) Dol-



lars, thereby leaving a balance due, owing and unpaid from the defendant to plaintiffs of Sixty Thousand (\$60,000.00) Dollars; that demand has been made therefor and payment has been and still is refused.

5.

That as aforesaid, defendant is a foreign corporation doing business in this State and engaged in buying lumber in Montana, and in shipping it to other States; that it has no property or assets within this State, save and except the said lumber so bought and unshipped.

That at this time the defendant possesses, and has at a certain yard, at Fletcher Spur, in Flathead County, near Pablo, Missoula County, Montana, One Million Six Hundred and Fifteen Thousand Seven Hundred and Eighty-six (1,615,786) feet of lumber stacked and piled near the said Spur, and marked, or stenciled as follows, to wit: Turner, Dennis and Lowry Lumber Company; that the said lumber is ready for sale or shipment and can, and may be taken and shipped out of this State, by the defendant, or some purchaser of the defendant, at any time to the damage and injury of these plaintiffs as herein alleged.

6.

That the said lumber is the only property of the defendant within the State of Montana, plaintiffs state on information and belief, and within the jurisdiction of this Court, out of which these plaintiffs can obtain payment and satisfaction of the said amount so due them as [5] aforesaid; that

it is the purpose, intention and object of the defendant to sell and dispose of, and ship and take said lumber out of this State, so that these plaintiffs will have no security for, or means of satisfying their said claim, or any judgment they may recover in this action. That if defendant be permitted to dispose of its said lumber, or to ship it out of this state, the plaintiffs herein will sustain and suffer a great wrong, damage and injury and be without means of satisfying, or property of the defendant with which to satisfy their said claim or any judgment recovered by them herein against defendant.

## 7.

That by reason of the premises plaintiffs state on information and belief that they are entitled, upon giving bond in a sum fixed and approved by the Court, to a writ of sequestration for the seizure, holding and retention of said property pending this suit and action, and until its final determination, and until the further order of this Court.

WHEREFORE, plaintiffs pray decree and order of this Court:

1st. That defendant pay to the plaintiffs the said sum of Sixty Thousand (\$60,000.00) Dollars;

2d. That the said lumber be sequestered and possession thereof held to abide the result of this action or suit; and

3d. For such order, further or different relief as plaintiffs shall be entitled to.

## COUNT NUMBER THREE.

Plaintiffs herein for a further, separate and third



cause of action against the defendant, complain and allege:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling [6] lumber in the counties of Flathead and Missoula, in this State, and doing business under the firm name and style of Donlan and Henderson.

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of the said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That on or about the — day of October, 1920, the plaintiffs herein, at the special instance and request of the defendant, loaned and delivered to the defendant for its use and benefit the sum of Sixty Thousand (\$60,000.00) Dollars, which said sum and amount was accepted and used by the defendant; that the said sum is now due, owing and unpaid; that demand has been made for payment thereof and payment has been and is by the defendant refused.

4.

That there is now due, owing and unpaid from this defendant to the plaintiff the said sum of Sixty Thousand (\$60,000.00) Dollars together with

interest thereon at the rate of eight (8%) per cent per annum from date until paid.

WHEREFORE, plaintiffs pray judgment against the defendant for said sum of Sixty Thousand (\$60,000.00) Dollars, with all legal interest, on this count of their complaint.

COUNT NUMBER FOUR.

Plaintiffs herein for a further, separate and fourth cause of action against the defendant, complain and allege:

1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling [7] lumber in the counties of Flathead and Missoula, in this state, and doing business under the firm name and style of Donlan and Henderson.

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of the said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That on the 16th day of April, 1920, the plaintiffs and defendant made and entered into a contract by and under the terms of which the plaintiffs, as vendors, agreed to sell and deliver to the defendant, as vendee, all of the lumber then owned by the plaintiffs in their sawmill yard at Fletcher Spur, near Pablo, in Flathead County, Montana, and also

all lumber to be thereafter sawed, cut and manufactured by the plaintiffs at such place of operations up to the first (1st) day of January, 1921, and the defendant covenanted and agreed to purchase and buy said lumber; that a copy of said contract is attached hereto, filed herewith, made a part hereof as though incorporated at this place and marked Exhibit "A."

4.

That under and by virtue of the provisions and terms of said contract—Exhibit "A"—the defendant promised and agreed to pay and advance to the plaintiffs the sum of Twenty (\$20.00) Dollars on or before the 10th day of each month, during the life of said contract, on each and every thousand feet of lumber manufactured, piled and stacked at the said spur, upon which payment the title and possession of said lumber should be that of the defendant; that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur designated in said contract Six Hundred and [8] Ninety-nine Thousand Nine Hundred and Seventy-two (699,972) feet of lumber under and in performance of said contract; that defendant received a bill of sale for the same and all thereof from the plaintiffs, but refused and declined to pay said advance of Twenty (\$20.00) Dollars, or any other sum thereon, thereby and because thereof depriving the plaintiffs of the use and benefit of said money in their said logging and lumbering business and operations.

## 5.

That on the said 10th day of November, 1920, there became due, from the defendant to the plaintiffs, under and by virtue of said contract the sum of Thirteen Thousand Nine Hundred and Ninety-nine and 44/100 (\$13,999.44) Dollars, which amount defendant promised and agreed to pay, but which amount it wholly and fully failed to pay; that the same is now over due and wholly unpaid; that demand has been made therefor, and payment has been and is still refused; that the amount now due thereon, from the defendant to the plaintiffs is the said sum of Thirteen Thousand Nine Hundred and Ninety-nine and 44/100 (\$13,999.44) Dollars, together with interest at the rate of eight (8%) per cent per annum thereon from the said 10th day of November, 1920, until paid.

WHEREFORE, plaintiffs pray judgment on this count of their complaint against the defendant for the said sum of Thirteen Thousand Nine Hundred and Ninety-nine and 44/100 (\$13,999.44) Dollars, together with interest at the legal right until paid.

## COUNT NUMBER FIVE.

Plaintiffs herein for a further, separate and fifth cause of action against the defendant complain and allege:

## 1.

That at all of the times herein mentioned the plaintiffs were copartners in the business of dealing in manufacturing and selling lumber in the counties of Flathead and Missoula, in this State,

and doing business under the firm name and style of Donlan and Henderson. [9]

2.

That at all of the times herein mentioned the defendant was, and still is, a corporation of the State of Missouri, which was at all of the said times, and still is operating and doing business in this State, and engaged in handling, shipping and selling lumber in said counties.

3.

That on the 16th day of April, 1920, the plaintiffs and defendant made and entered into a contract by and under the terms of which the plaintiffs, as vendors, agreed to sell and deliver to the defendant, as vendee, all of the lumber then owned by the plaintiffs in their sawmill yard at Fletcher Spur, near Pablo, in Flathead County, Montana, and also all lumber to be thereafter sawed, cut and manufactured by the plaintiffs at such place of operations up to the first (1st) day of January, 1921, and the defendant covenanted and agreed to purchase and buy said lumber; that a copy of said contract is attached hereto, filed herewith, made a part hereof as though incorporated at this place and marked Exhibit "A."

4.

That under and by virtue of the provisions and terms of said contract—Exhibit "A"—the defendant promised and agreed to pay and advance to the plaintiffs the sum of Twenty (\$20.00) Dollars on or before the 10th day of each month, during the life of said contract, on each and every thousand



feet of lumber manufactured, piled and stacked at the said Spur, upon which payment the title and possession of said lumber should be that of the defendant; that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur designated in said contract Six Hundred and Ninety-nine Thousand Nine Hundred and Seventy-two (699,972) feet of lumber under and in [10] performance of said contract; that defendant received a bill of sale for the same and all thereof from the plaintiffs, but refused and declined to pay said advance of Twenty (\$20.00) Dollars, or any other sum thereon, thereby and because thereof depriving the plaintiffs of the use and benefit of said money in their said logging and lumbering business and operations.

## 5.

That after said default and breach of contract by the defendant, these plaintiffs for a period continued their said sawing, manufacturing and lumbering operations at said place; that by the 20th day of November, 1920, they had sawed, in addition to the lumber mentioned in paragraph "4" hereof, about one million (1,000,000) feet of lumber and had stacked and piled the same in said yard at spur. That defendant did not on or prior to the 10th day of December, or at any other time accept and advance on said one million (1,000,000) feet of lumber, the said sum of Twenty (\$20.00) Dollars per thousand feet, or any other sum whatsoever or at all.

6.

That defendant well knew that plaintiffs were dependent upon said monthly payments in order to sustain themselves, continue said business and operations; and on information and belief the plaintiffs state that said payments were refused by defendant for the purpose and object, and with the intention and design to so cripple and injure these plaintiffs that they must perforce close their said business and close said lumbering and manufacturing operations.

7.

That defendant thus and otherwise breached and violated its said contract, and thereby and because thereof made it impossible for plaintiffs to continue their said manufacturing and logging operations under said contract from and after the 20th day of November, 1920, to January 1st, 1921, as contemplated by said contract, on account of lack of [11] funds and money so caused by said defaults; that had the defendant not so breached its said contract the plaintiffs would have continued said operations until January 1st, 1921, would have turned and manufactured and delivered about one million additional feet of lumber under said contract, Exhibit "A," and have thereby made a net profit, save for said defaults of defendant, of Fifteen (\$15,000.00) Thousand Dollars.

8.

That by reason of the premises, and on account of said wrongful acts of the defendant the plaintiffs have been and are, they state on information

and belief, damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

WHEREFORE, plaintiffs pray judgment on this count of their complaint for the sum of Fifteen Thousand (\$15,000.00) Dollars damages, and on all counts for costs and all proper relief.

(Signed)    A. J. VIOLETTE and  
                  HARRY H. PARSONS,  
Attorneys for Plaintiffs.    [12]

State of Montana,  
County of Missoula,—ss.

Ben W. Henderson, being first duly sworn, upon his oath deposes and says: That he is a member of the copartnership firm of Donlan and Henderson, and as such has a right and authority to make this verification; that he has read the above and foregoing complaint, knows the contents thereof, and it is true of his own knowledge, save as to those matters stated on information and belief as to which he believes it true, and that this verification is made for, and on behalf of the said copartnership firm of Donlan and Henderson.

(Signed)    BEN W. HENDERSON.

Subscribed and sworn to before me this 17th day of December, 1920.

[Seal]    (Signed)    HARRY H. PARSONS,  
Notary Public for the State of Montana, Residing  
                  at Missoula, Montana.

My commission expires February 18th, 1922.

(1) 8062.    Filed Dec. 20, 1920.    H. M. Rawn,  
Clerk.    By P. H. Gerber, Deputy.    [13]



**Exhibit "A."****CONTRACT OF SALE.**

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between DONLAN & HENDERSON, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, hereinafter called the vendees.

**WITNESSETH.**

That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, "All of the lumber now owned by the vendors in pile at the their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921.

And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as herein-

after specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory of finished piles in the mill yard taken on or before the 10th day of each month, providing, however, that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above [14] mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendors shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber *has* hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the [15] vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said

lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber-yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purposes of this contract.

8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN & HENDERSON,

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER  
COMPANY,

By THOS. S. DENNIS,

Secy. & Treas.

Attest: \_\_\_\_\_,

Secretary.

Filed Feb. 16, 1921. C. R. Garlow, Clerk U. S.  
District Court, District of Montana. [16]

That on June 7th, 1921, amended answer was duly filed herein, in the words and figures following, to wit: [17]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDER-  
SON, Copartners Doing Business Under the  
Firm Name and Style of DONLAN AND  
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson  
County, Missouri,

Defendants.

**Amended Answer.**

Comes now the defendant and for its amended answer to plaintiffs' complaint:

**I.**

Admits the allegations of paragraph I of plaintiffs' first alleged cause of action.

**II.**

Admits that the defendant was and still is a corporation of the State of Missouri.

**III.**

Denies generally all of the allegations of said alleged first cause of action not herein specifically admitted or denied.



IV.

Admits the allegations of paragraph I of plaintiffs' second alleged cause of action.

V.

Admits that the defendant was and still is a corporation of the State of Missouri.

VI.

Denies generally all of the allegations of said alleged second cause of action not herein specifically admitted or denied. [18]

VII.

Admits the allegations of paragraph I of plaintiffs' third alleged cause of action.

VIII.

Admits that the defendant was and still is a corporation of the State of Missouri.

IX.

Denies generally all of the allegations of said alleged third cause of action not herein specifically admitted or denied.

X.

Admits the allegations of paragraph I of plaintiffs' fourth alleged cause of action.

XI.

Admits that the defendant was and still is a corporation of the State of Missouri.

XII.

Defendant admits that on the 16th day of April, 1920, the plaintiffs and defendant executed the instrument described as Exhibit "A" attached to plaintiffs' complaint and that the said Exhibit "A"

so attached to plaintiffs' complaint is a true copy of said instrument.

Defendant admits that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur referred to in plaintiffs' complaint 699,972 feet of lumber and that it received a bill of sale for the same.

XIII.

Denies generally all of the allegations of said alleged fourth cause of action not herein specifically admitted or denied.

XIV.

Admits the allegations of paragraph I of plaintiffs' fifth alleged cause of action.

XV.

Admits that the defendant was and still is a corporation [19] of the State of Missouri.

XVI.

Defendant admits that on the 16th day of April, 1920, the plaintiffs and defendant executed the instrument described as Exhibit "A" attached to plaintiffs' complaint and that the said Exhibit "A" so attached to plaintiffs' complaint is a true copy of said instrument.

Defendant admits that on the 10th day of November, 1920, the plaintiffs had manufactured, piled and stacked in the yard and at the spur referred to in plaintiffs' complaint 699,972 feet of lumber and that it received a bill of sale for the same.

XVII.

Denies generally all of the allegations of said al-

leged fifth cause of action not herein specifically admitted or denied.

### XVIII.

For further and separate answer to the first and second counts of the plaintiffs' complaint, this defendant alleges and says:

That if the lumber referred to in said first and second counts of plaintiffs' complaint, or any part thereof, be or was the lumber destroyed by fire at Pablo, Montana, on the 3d day of August, 1920, this defendant alleges that said lumber was, prior to said 3d day of August, 1920, caused by the plaintiffs' to be insured against loss by fire for the benefit of and to secure the parties hereto and such interests therein as they may have had, and that subsequent to the said 3d day of August, 1920, and after the destruction of said lumber by fire, and prior to the commencement of this action, the plaintiffs received from the insurers of said property and lumber on account of the said policies of insurance the sum of \$70,000, being an amount in excess of the amount sued for in said first and second counts of said complaint, and that by reason thereof, if any amount was ever owned by the defendant to the plaintiffs, which defendant denies, the same has been fully paid, satisfied and discharged by [20] reason of the receipt of the proceeds of said insurance policies as aforesaid, and that said sum, so received as aforesaid, was received by plaintiffs for and on behalf of the defendant and that defendant is entitled, in law and in equity, to have the said



sum applied to a liquidation of the accounts between the parties hereto.

### COUNTERCLAIM.

For further answer and by way of counterclaim defendant alleges, and for first cause of action says:

#### I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri with its principal place of business in Kansas City in said state.

#### II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

#### III.

That on or about the 16th day of April, 1920, the plaintiffs, for a valuable consideration, made, executed and delivered to the defendant their promissory note in the sum of \$10,000, payable four months after date to the order of the defendant, with interest thereon from the date thereof at the rate of seven per cent per annum. Said note provided further that in case of suit to recover thereon a reasonable attorney's fee to be fixed and allowed by the Court should be taxed and collected as a part of the costs of action.

IV.

That the said note was and is in the words and figures following, to wit: [21]

“\$10,000.00 Missoula, Montana, April 16, 1920.

On or before Four Months after date, for value received we or either of us promise to pay Turner, Dennis & Lowry Co. or order the sum of Ten Thousand Dollars with interest thereon at the rate of seven per cent per annum from date until paid. (In case of suit to recover hereon a reasonable attorneys fee to be fixed and allowed by the court shall be taxed and collected as a part of the costs of the action.)

Payable at —.

No. —.

Due 8/16.

DONLAN & HENDERSON.

BEN W. HENDERSON.

E. DONLAN.”

V.

That the defendant is now the owner and holder of said note and was the owner and holder thereof at the time of the commencement of this action; that said note has not been paid nor any part thereof, save and except the sum of \$3,235.27 paid thereon on the 3d day of August, 1920; that demand for the payment of the balance due on said note has been made upon the plaintiffs by the defendant prior to the commencement of this action, and payment has been by the plaintiffs and each of them refused, and there is now due and owing thereon from the plaintiffs and each of them to the defend-

ant herein the sum of \$6,974.73 together with interest thereon at the rate of seven per cent per annum from the 3d day of August, 1920.

VI.

That the sum of \$750 is a reasonable attorney's fee to be fixed and allowed by the Court to the defendant and to be taxed and collected as a part of the costs of action herein.

WHEREFORE defendant prays judgment against the plaintiffs and each of them on this its first cause of action for the sum of \$6,974.73 together with interest thereon at the rate of seven per cent per annum from the 3d day of August, 1920; for the sum of \$750 to be fixed and allowed by the Court as attorney's fees as provided in said note and for its costs herein expended.

For further answer to plaintiffs' complaint and by way of counterclaim and as a second cause of action against the plaintiffs, defendant alleges:  
[22]

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm

name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

### III.

That on or about the 28th day of June, 1920, the plaintiffs, for a valuable consideration, made, executed and delivered to the defendant their promissory note in the sum of \$6,082.24, payable September 1st, 1920, to the order of the defendant, with interest thereon at the rate of eight per cent per annum from date until paid, interest payable semi-annually. Said note further provided that in case of default in the payment of the same that plaintiffs would pay to the defendant, or the holder of said note, a reasonable attorney's fee to be fixed and determined by the Court.

### IV.

That the following is a copy of said note, to wit:  
"\$6082.24     Missoula, Montana, June 28th, 1920.

On September 1st, 1920, after date, I, we, or either of us, promise to pay to Turner, Dennis & Lowry Lumber Co., or order, the sum of Six Thousand and Eighty-two and 24/100 Dollars For Value received, payable at Missoula Trust and Savings Bank, Missoula, Montana, with interest at the rate of eight per cent per annum from date until paid; interest payable semi-annually. And further agree that in case of default in the payment of this note, principal or interest, to pay all costs and expenses of collecting the same, including reasonable attorney's fees, to be fixed and determined by the Court. Each of the makers hereof

and the endorsers hereon waive demand, protest and notice of nonpayment.

No. —.

Due —.

Address —.

DONLAN & HENDERSON,  
By E. DONLAN.”

V.

That the defendant is now the owner and holder of said note and was such owner and holder at the time of the commencement [23] of this action; that the said note has not been paid nor any part thereof, and there is now due and owing thereon and on account thereof from the plaintiffs and each of them to the defendant herein the sum of \$6,082.24 together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920.

VI.

That the sum of \$750 is a reasonable attorney's fee to be fixed and allowed by the Court to the defendant and to be taxed and collected as a part of the costs of action herein.

WHEREFORE defendant prays judgment against the plaintiffs and each of them on account of this its second cause of action for the sum of \$6,082.24, together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920; for the sum of \$750 to be fixed and allowed the defendant as attorney's fees as provided in said note and for defendants costs herein expended.

For further answer to plaintiffs' complaint and

by way of counterclaim and for a third cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on or about the 28th day of June, 1920, the plaintiffs, for a valuable consideration, made, executed and delivered [24] to the defendant their promissory note in the sum of \$5,000, payable October 1st, 1920, to the order of the defendant, with interest thereon at the rate of eight per cent per annum from date until paid, interest payable semi-annually. Said note further provided that in case of default in the payment of the same that plaintiffs would pay to the defendant, or the holder of said note, a reasonable attorney's fee to be fixed and determined by the Court.

IV.

That the following is a copy of said note, to wit:

“\$5000.00      Missoula, Montana, June 28, 1920.

On October 1st, 1920, after date, I, we, or either



of us promise to pay to Turner, Dennis & Lowry Lumber Co., or order, the sum of Five Thousand Dollars for value received, payable at Missoula Trust and Savings Bank, Missoula, Montana, with interest at the rate of eight per cent per annum from date until paid; interest payable semi-annually. And further agree that in case of default in the payment of this note, principal or interest, to pay all costs and expenses of collecting the same, including reasonable attorney's fees to be fixed and determined by the Court. Each of the makers hereof and the endorsers hereon waive demand, protest and notice of nonpayment.

No. —.

Due. —.

Address. —.

DONLAN & HENDERSON,

By E. DONLAN."

V.

That the defendant is now the owner and holder of said note and was such owner and holder at the time of the commencement of this action; that the said note has not been paid not any part thereof, and there is now due and owing thereon and on account thereof from the plaintiffs and each of them to the defendant herein the sum of \$5,000 together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920.

VI.

That the sum of \$500 is a reasonable attorney's fee to be fixed and allowed by the Court to the defend-



ant and to be taxed and collected as a part of the costs of action herein.

WHEREFORE DEFENDANT PRAYS JUDGMENT AGAINST THE PLAINTIFFS and each of them on account of this its third cause of action for [25] the sum of \$5,000 together with interest thereon at the rate of eight per cent per annum from the 28th day of June, 1920; for the sum of \$500 to be fixed and allowed the defendant as attorney's fees as provided in said note and for defendant's costs herein expended.

#### COUNT NUMBER FOUR.

For further answer to plaintiffs' complaint and by way of counterclaim and as a fourth cause of action against the plaintiffs, defendant alleges:

##### I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

##### II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and residents and citizens of the State of Montana.

##### III.

That on or about the 15th day of April, 1920, the plaintiffs and defendant entered into a contract or agreement, whereby defendant agreed to

lend the plaintiffs the sum of \$20,000, for which sum plaintiffs agreed to give to the defendant their notes, and defendant agreed to advance and lend to the plaintiffs certain sums of money to be determined, loaned and computed as follows, to wit: Defendant agreed to advance and lend to the plaintiffs at the time of the making of said contract a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at Fletcher's Spur near Pablo, Flathead County, Montana, and defendant agreed to advance and lend to the plaintiffs on or before the 10th day of each month thereafter during [26] the life of said contract a sum equal to \$20.00 per thousand feet on all lumber sawed, cut and manufactured by the plaintiffs after the date of the said contract and prior to the 10th day of each succeeding month during the life of said contract, said loans and advancements to be based upon an inventory of finished piles of lumber in said mill yard, which inventory was to be taken on or before the 10th day of each succeeding month during the life of said contract. That it was further provided by the said contract that as security for the loans and advancements so to be made by the defendant as aforesaid, the plaintiffs would give to the defendant at the time of each of said loans and advancements bills of sale describing the lumber on account of which the respective advances and loans were made, it being the intention of the parties thereby to give and receive said bills of sale as security and as evidence of a factor's lien. That it was further

provided in said contract that one-half of the loans or advances upon lumber to be thereafter manufactured should be applied by the parties in payment of the said notes for \$20,000 until such time as said notes should be paid in full, and it was agreed under and by the terms of said contract that the defendant should market and sell said lumber for and on account of the plaintiffs at the highest market prices obtainable at the times of making such sales and that the proceeds of said sales should be paid to the plaintiffs after deducting from the price at which said sales were made the necessary freight and railroad charges, a trade discount of two per cent, a commission of fifteen per cent to be paid to or deducted by the defendant for the defendant's services in making said sales, and the sum of \$20.00 per thousand feet loaned or advanced by defendant on account of the said lumber as provided is said contract.

It was further provided by said contract that the said sums of \$20.00 per thousand feet upon said lumber should be repaid to the defendant out of sales of said lumber to be made in the [27] manner aforesaid and plaintiffs agreed to pay the defendant interest upon said loans and advances at the rate of seven per cent per annum.

That is was further agreed by the said contract that all of said loans so to be made by the defendant to the plaintiffs herein should bear interest at the rate of seven per cent per annum from and after the date the said loans should be made until paid, and it was further agreed that the plaintiffs

should deliver said lumber f. o. b. cars at said Fletcher's Spur, and should dress the same, if required, as the defendant should direct and order and at such times as defendant should direct and order in order that defendant might be enabled to sell said lumber for and on behalf of the plaintiffs.

Said contract further provided that the plaintiffs would, at their own expense, cause all of said lumber manufactured by them or to be manufactured by them as aforesaid to be insured and to be kept insured at all times against loss by fire for the sum of \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That said contract further provided and it was by and through said contract agreed between the parties thereto that in the event that any of said lumber should be lost or destroyed by fire at any time after defendant should have loaned or advanced money thereon, then and in that event, said insurance of \$25.00 per thousand feet of said lumber so destroyed should be paid to the defendant in liquidation of its loss and damage on account of the advances made upon said lumber, and on account of the loss and damage which defendant would in that event suffer by reason of the trouble and expense to which defendant would have been put in the performance of the said contract with reference to the lumber so destroyed by fire and on account of the loss and damage which defendant would suffer in that event by reason of defendant's inability to collect or procure its commission for the sale of the lumber so destroyed by fire. [28]

## IV.

That thereafter, and on the same day, the plaintiffs and defendant entered upon the performance of said contract and duly made the loans and advancements agreed to be made by defendant at the time of the making of said contract, and on said 15th day of April, 1921, the defendant, in performance of the said agreement, loaned to the plaintiffs a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at said Fletcher's Spur. That thereafter and on the 16th day of April, 1920, the plaintiffs and defendant, for the purpose and with the intention of making a written memorandum of their said agreement theretofore made as hereinbefore alleged, and for the purpose of putting said contract and agreement in writing, executed an instrument in the words and figures following, to wit:

## "CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between DONLAN & HENDERSON, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, hereinafter called the vendees.

## WITNESSETH.

That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to



sell and deliver to the vendees, and the vendees hereby agree to buy, 'All of the lumber now owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921. And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made made monthly, based upon an inventory of finished piles in the millyard taken on or before the [29] 10th day of each month, PROVIDING, however, that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advance-



ment this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendors shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15% less 2% trade discount, and less \$20.00 per thousand feet already

paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designed as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purpose of this contract.

8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the

loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920. [30]

DONLAN AND HENDERSON.

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER  
COMPANY.

By THOS. S. DENNIS,  
Secy. & Treas.

Attest: \_\_\_\_\_

Secretary."

V.

That said written instrument was drawn by the plaintiffs' attorney and that the words and language used therein was chosen and selected by him. That after making and entering into said contract, the parties hereto proceeded to carry out said agreement according to their understanding thereof, and that at all times and at the time of the making of said agreement and at all times subsequent thereto, the parties thereto understood and intended the said contract to be and provide as alleged in paragraph III hereof, and understood and intended the said contract to be a contract providing for loans to be made by defendant to plaintiffs and for the sale of lumber by defendant on behalf of plaintiffs, for a factor's commission of fifteen per cent, and understood and intended that the

plaintiffs should pay the defendant interest upon the amounts so loaned to the plaintiffs and that plaintiffs should cause said lumber to be insured for the sum of \$25.00 per thousand feet thereof, the loss thereon to be made payable to the defendant, and that such sum should be paid to the defendant in liquidation of its loss and damage on account of the loans and advancements made upon said lumber and its services performed in connection with said contract in the event that any of said lumber should be destroyed by fire. That it was understood and intended by the parties thereto at all of said times that the risk of loss by fire of said lumber should not be upon the defendant and the parties thereto at all times acted upon, treated, understood and interpreted and by their conduct practically construed said contract as having the force and effect hereinafter alleged and set out.

## VI.

That thereafter plaintiffs and defendant entered upon [31] the performance of the said contract and agreement and defendant duly performed all of the conditions of said contract on its part to be performed and on the date of said contract, defendant loaned to the plaintiffs the sum of \$40,000 on account of 2,000,000 feet of lumber then on hand, manufactured and piled in the said sawmill yard and that thereafter and prior to the 3d day of August, 1920, the plaintiffs sawed, cut and manufactured at said sawmill 1,338,412 additional feet of lumber pursuant to the terms of said contract, and

prior to and upon the said 3d day of August, 1920, defendant advanced and loaned to the plaintiffs upon said additional feet of lumber in the manner provided in said contract the sum of \$20.00 per thousand feet. That from said 2,000,000 feet and said 1,338,412 feet of lumber hereinbefore referred to, plaintiffs shipped eleven car loads of lumber containing 322,474 feet of lumber, and said lumber so shipped was sold by the defendant pursuant to the terms of said contract for and on account of the plaintiffs and the proceeds of said sale were applied as provided in said contract to the payment of a trade discount of two per cent, a commission of fifteen per cent to the defendant for its services in making said sale, to the repayment to defendant of \$20.00 per thousand feet of said lumber so shipped as aforesaid on account of the said sums so previously advanced upon said lumber by the defendant and the remainder of the sale price was duly paid to the plaintiffs by crediting the same to plaintiffs' account as stated in paragraph IX hereof, and that the remainder of said 2,000,000 feet and 1,338,412 feet of lumber over and above the quantity so shipped as aforesaid, that is to say, 3,015,938 feet of lumber was piled at the said sawmill yard on the said 3d day of August, 1920, and at said time and on said date defendant had loaned and advanced to the plaintiffs the sum of \$20.00 per thousand feet upon all of said 3,015,938 feet of lumber. [32]

## VII.

That by reason of the premises and under the



terms of said contract it was then on said date the duty of the plaintiffs to keep said quantity of lumber insured against loss by fire for \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That on said date the plaintiffs had insured said lumber for the sum of \$70,000, the loss thereon having been made payable to the plaintiffs or the defendant as their interests might appear, and plaintiffs had insured said lumber for the further sum of \$60,000 against loss by fire, the loss thereon being made payable to the plaintiffs alone and on said date no other insurance against loss by fire had been procured upon the said quantity of lumber.

### VIII.

That on said 3d day of August, 1920, said 3,015,938 feet of lumber was destroyed by fire and that by reason thereof the defendant became immediately entitled under the terms of said contract to have and receive in liquidation of its loss and damage thereby suffered the sum of \$25.00 per thousand feet upon the said 3,015,938 feet of lumber so destroyed as aforesaid. That on or about the 1st day of October, 1920, the plaintiffs collected the sum of \$70,000 as insurance paid for the loss of said lumber, and thereafter and on or about the 1st day of November, 1920, plaintiffs collected the further sum of \$60,000 as insurance on account of the loss of said lumber as aforesaid, and that by reason of the premises it was then the duty of the plaintiffs at the time the said respective sums were received to pay to the defendant the



sum of \$25.00 per thousand feet upon said 3,015,938 feet of lumber, that is to say, the sum of \$75,398.45; but that said sum has not been paid nor any part thereof, save and except the sum of \$60,000 paid to the defendant by the plaintiffs on the 2d day of October, 1920, and there still remains due and owing to the defendant from the plaintiffs on account of the money collected from insurance upon said lumber as [33] aforesaid, the sum of \$15,398.45, together with interest thereon at the rate of eight per cent per annum from the 1st day of November, 1920, less the sum of \$13,999.44 credited to plaintiffs by the defendant as hereinafter alleged.

### IX.

That subsequent to the said 3d day of August, 1920, defendant continued to perform its obligations under the said contract and duly performed all of the conditions of said contract on its part to be performed and that subsequent to the 3d day of August, 1920, and prior to the 8th day of November, 1920, the plaintiffs cut, sawed and manufactured 1,615,786 feet of lumber under the terms of said contract and defendant loaned and advanced to the plaintiffs upon the said lumber the sum of \$20.00 per thousand feet thereof, which loans and advances were made as follows, to wit: The sum of \$10,289.-98 was loaned on the 2d day of September, 1920, on account of 514,499 feet of lumber, the sum of \$8,026.30 was loaned on the 30th day of September, 1920, on 401,315 feet of lumber, the sum of \$13,999.-44 was loaned on the 8th day of November, 1920,

on 699,972 feet of lumber by defendant's then crediting to the plaintiffs that sum of money as a payment upon the said sum of \$15,398.45 then due the defendant from the plaintiffs as stated in paragraph VIII hereof, and defendant, at the time of making and allowing said credit, notified the plaintiffs that said credit had been made.

X.

That plaintiffs are entitled to credits upon the said amounts so due as aforesaid by reason of the remainder or balance received upon the purchase price of the eleven carloads of lumber referred to in paragraph VI hereof, and that the remainders or balances so received and credited to plaintiffs by the defendant, and the dates of the same, were as follows: On the 16th day of September, 1920, the sum of \$1,159.19; on the 21st day of September, 1920, the sum of \$414.45; on the 5th day of November, 1920, the sum of \$518.36 [34] and on the 22d day of December, 1920, the sum of \$257.64. That no sums whatever other than the sums above stated have been paid defendant upon plaintiffs' said account and indebtedness.

XI.

That prior to and at the time of the commencement of this action the plaintiffs caused said 1,615,786 feet of lumber to be taken possession of by the sheriff of Flathead County, Montana, and wrongfully caused the same to be attached and seized, thereby rendering it impossible for the plaintiffs to perform their said contract or to ship or consign the said lumber so that defendant might sell the

same on account of the plaintiffs, and rendered the performance of said contract by the parties hereto wholly impossible, by reason of which it became and is impossible for the defendant to sell said lumber and to procure reimbursement for the loan of \$20.00 per thousand feet upon said lumber, and on account thereof the said sum of \$20.00 per thousand feet upon all of said 1,615,786 feet of lumber became immediately due and payable from the plaintiffs to the defendant, together with interest thereon at the rate of seven per cent per annum from the dates of the respective loans and advances hereinbefore alleged and set out, and the plaintiffs are and were at the time of the commencement of this action indebted to the defendant on account of the premises in the sum of \$31,891.03, together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them upon this its fourth cause of action for the sum of \$31,891.03 together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920, and for defendant's costs herein expended.  
[35]

#### COUNT NUMBER FIVE.

For further answer to plaintiffs' complaint and by way of counterclaim and as a fifth cause of action against the plaintiffs, defendant alleges:

##### I.

That the defendant is and was at all the times herein mentioned a corporation organized and exist-

ing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said State.

## II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

## III.

That between the 15th day of April, 1920, and the 8th day of November, 1920, the defendant loaned to the plaintiffs, at plaintiffs' special instance and request, the sum of \$99,083.96 at the times and in the amounts following, to wit: \$40,000 on the 15th day of April, 1920; \$17,835.52 on the 28th day of June, 1920; \$8,932.72 on the 3d day of August, 1920; \$10,289.98 on the 2d day of September, 1920; \$8,026.30 on the 30th day of September, 1920, and \$13,999.44 on the 8th day of November, 1920, which sums and each and all of them the plaintiffs promised to repay to defendant within a reasonable time, with interest on each of said sums from the dates loaned at the rate of seven per cent per annum. That said reasonable time has now elapsed and had so elapsed prior to the commencement of this action, and after said reasonable time had elapsed and before the commencement of this action, the defendant duly demanded payment of the same from the plaintiffs, but that said sum or sums have not been paid nor any part thereof, save and except

the sum of \$420.96 paid on the 29th day of June, 1920, the sum of \$511.94 and [36] the sum of \$558.76 paid on the 1st day of July, 1920, the sum of \$525.38 and the sum of \$570.20 paid on the 10th day of July, 1920, the sum of \$738.74 and the sum of \$685.44 paid on the 12th day of July, 1920, the sum of \$553.98 paid on the 30th day of July, 1920, the sum of \$544 paid on the 1st day of August, 1920, the sum of \$553.18 paid on the 3d day of August, 1920, the sum of \$786.90 paid on the 12th day of August, 1920, the sum of \$585.18 and the sum of \$251.19 and the sum of \$322.82 paid on the 16th day of September, 1920, the sum of \$209.13 and the sum of \$205.32 paid on the 21st day of September, 1920, the sum of \$60,000 paid on the 2d day of October, 1920, the sum of \$518.36 paid on the 5th day of November, 1920, and the sum of \$257.64 paid on the 22d day of December, 1920. That interest should be computed upon the amounts so loaned as aforesaid at the rate of seven per cent per annum from the dates the respective sums were loaned as aforesaid and that a computation of the interest due and owing and the amounts paid prior to the said 22d day of December, 1920, shows that there was due the defendant from the plaintiffs on said date on account of the premises the sum of \$32,224.72.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them upon this its fifth cause of action for the sum of \$32,224.72, together with interest thereon at the rate of seven



per cent per annum from the 22d day of December, 1920, and for defendant's costs herein expended.

COUNT NUMBER SIX.

For further answer to plaintiffs' complaint and by way of counterclaim and as a sixth cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue [37] of the laws of the State of Missouri, with its principal place of business in Kansas City in said State.

II.

That at all of the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That at various times between the 16th day of April, 1920, and the 3d day of August, 1920, plaintiffs borrowed from the defendant and defendant loaned to plaintiffs certain sums of money, which loans were secured by certain lumber owned by and manufactured by the plaintiffs up to and including the said 3d day of August, 1920, and that on said 3d day of August, 1920, a certain portion of said lumber was destroyed by fire, and by reason thereof plaintiffs became indebted to defendant on account of certain insurance upon the said lumber, and that at various times between the 16th day of



April, 1920, and the 2d day of October, 1920, plaintiffs made various payments upon the loans and indebtedness hereinbefore referred to. That thereafter and on or about the 3d day of October, 1920, an account was stated between the plaintiffs and defendant as an account stated upon all of the said dealings between the plaintiffs and the defendant relating to said loans made by defendant to plaintiffs up to and including the said 3d day of August, 1920, and relating to the said lumber so lost by fire on said date, upon which statement a balance was found to be due from the plaintiffs to the defendant of \$36,329.43, which sum the plaintiffs then and there promised to pay to the defendant.

#### IV.

That plaintiffs have not paid the same nor any part thereof and there is now due and owing to the defendant from the plaintiffs on account of the premises the sum of \$36,329.43, together with [38] interest thereon at the rate of eight per cent per annum from the 3d day of October, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them on this defendant's sixth cause of action for the sum of \$36,329.43, together with interest thereon at the rate of eight per cent per annum from the 3d day of October, 1920, and for defendant's costs herein expended.

#### COUNT NUMBER SEVEN.

For further answer to plaintiffs' complaint and by way of counterclaim and as a seventh cause of action against the plaintiffs, defendant alleges:

I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

III.

That on the 1st day of October, 1920, at Missoula, Montana, the plaintiffs received from Firemans Fund Fire Insurance Company and Palatine Insurance Company and American Insurance Company the sum of \$10,000, to and for the use of the defendant, and thereafter and on or about the 1st day of November, 1920, the plaintiffs received from the Inter Insurance Exchange the sum of \$60,000.00 to and for the use of the plaintiffs.

IV.

That thereafter and prior to the commencement of this action the defendant demanded payment of the said sum so received by the plaintiffs for the use of the defendant, but that the said sum [39] has not been paid nor any part thereof, and there is now due and owing to the defendant from the plaintiffs the sum of \$16,398.45, together with interest upon \$10,000 thereof at the rate of eight

per cent per annum from the 1st day of October, 1920, and with interest upon \$5,398.45 thereof at the rate of eight per cent per annum from the 1st day of November, 1920.

Wherefore, defendant prays judgment against the plaintiffs and each of them upon this, defendant's seventh cause of action for the sum of \$15,398.45 together with interest upon \$10,000 thereof at the rate of eight per cent per annum from the 1st day of October, 1920, and interest upon \$5,398.45 thereof at the rate of eight per cent per annum from the 1st day of November, 1920, together with defendant's costs herein expended.

#### COUNT NUMBER EIGHT.

For further answer to plaintiffs' complaint and by way of counterclaim and as an eighth cause of action against the plaintiffs, defendant alleges:

##### I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

##### II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

##### III.

That on or about the 15th day of April, 1920, the

plaintiffs and defendant entered into a contract or agreement, whereby defendant agreed to lend the plaintiffs the sum of \$20,000, for which sum plaintiffs agreed to give to the defendant their notes, and defendant agreed to advance and lend to the plaintiffs certain [40] sums of money to be determined, loaned and computed as follows, to wit: Defendant agreed to advance and lend to the plaintiffs at the time of the making of said contract a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at Fletcher's Spur, near Pablo, Flathead County, Montana, and defendant agreed to advance and lend to the plaintiffs on or before the 10th day of each month thereafter during the life of said contract a sum equal to \$20.00 per thousand feet on all lumber sawed, cut and manufactured by the plaintiffs after the date of the said contract and prior to the 10th day of each succeeding month during the life of said contract, said loans and advancements to be based upon an inventory of finished piles of lumber in said mill yard, which inventory was to be taken on or before the 10th day of each succeeding month during the life of said contract. That it was further provided by the said contract that as security for the loans and advancements so to be made by the defendant as aforesaid, the plaintiffs would give to the defendant at the time of each of said loans and advancements bills of sale describing the lumber on account of which the respective advances and loans were made, it being the intention of the parties thereby to give and receive said bills

of sale as security, and as evidence of a factor's lien. That it was further provided in said contract that one-half of the loans or advancements upon lumber to be thereafter manufactured should be applied by the parties in payment of the said notes for \$20,000 until such time as said notes should be paid in full, and it was agreed under and by the terms of said contract that the defendant should market and sell said lumber for and on account of the plaintiffs at the highest market prices obtainable at the times of making such sales and that the proceeds of said sales should be paid to the plaintiffs after deducting from the price at which said sales were made the necessary freight and railroad charges, at trade discount of two per cent, a commission of [41] fifteen per cent to be paid to or deducted by the defendant for the defendant's services in making said sales, and the sum of \$20.00 per thousand feet loaned or advanced by defendant on account of the said lumber as provided in said contract.

It was further provided by said contract that the said sums of \$20.00 per thousand feet upon said lumber should be repaid to the defendant out of sales of said lumber to be made in the manner aforesaid and plaintiffs agreed to pay the defendant interest upon said loans and advances at the rate of seven per cent per annum.

That it was further agreed by the said contract that all of said loans so to be made by the defendant to the plaintiffs herein should bear interest at the rate of seven per cent per annum



from and after the date the said loans should be made until paid, and it was further agreed that the plaintiffs should deliver said lumber f. o. b. cars at said Fletcher's Spur, and should dress the same, if required, as the defendant should direct and order in order that defendant might be enabled to sell said lumber for and on behalf of the plaintiffs.

Said contract further provided that the plaintiffs would, at their own expense, cause all of said lumber manufactured by them or to be manufactured by them as aforesaid to be insured and to be kept insured at all times against loss by fire for the sum of \$25.00 per thousand feet, the loss thereon to be made payable to the defendant.

#### IV.

That thereafter, and on the same day, the plaintiffs and defendant entered upon the performance of said contract and duly made the loans and advancements agreed to be made by defendant at the time of the making of said contract, and on said 15th day of April, 1921, the defendant, in performance of the said agreement, loaned to the plaintiffs a sum equal to \$20.00 per thousand feet [42] on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at said Fletcher Spur. That thereafter and on the 16th day of April, 1920, the plaintiffs and defendant, for the purpose and with the intention of making a written memorandum of their said agreement theretofore made as hereinbefore alleged, and for the purpose of putting said contract and agreement in writing, exe-



cuted an instrument in the words and figures following, to wit:

“CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between Donlan and Henderson, a copartnership, of Pablo, Missoula County, Montana, hereinafter called the vendors, and Turner, Dennis & Lowry Lumber Company, a corporation of Jackson County, Missouri, hereinafter called the vendees.

WITNESSETH.

That said vendors, for and in consideration of the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, All of the lumber now owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921.

And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00 which shall be

evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory the finished piles in the mill yard taken on or before the 10th day of each month, PROVIDING, however, that \$10.00 per thousand feet of such advancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven (7%) per cent per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month, based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendors shall manufacture and grade said [43] lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standards.

3. That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of

the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the vendors may retain the right to occupy and use the same for the purpose of this contract.

8. That the vendor shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN AND HENDERSON.

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER  
COMPANY.

By THOS. S. DENNIS,  
Secretary and Treasurer.

Attest: \_\_\_\_\_

Secretary."

## V.

That said written instrument was drawn by the plaintiffs' attorney and that the words and language used therein was chosen and selected by him. That after making and entering into said contract, the parties hereto proceeded to carry out said agreement according to their understanding thereof, and that at all times and at the time of the making of said agreement and at all times subsequent thereto, the parties thereto understood and intended the said contract to be and provide as alleged in paragraph III hereof, and understood and intended the said contract to be a contract providing for loans to be made by defendant to plaintiffs and for the sale of lumber by defendant on behalf of plaintiffs for a factor's commission of fifteen per cent, and understood and intended that the plaintiffs should pay the defendant interest upon the amounts so loaned to the plaintiffs and that plaintiffs should cause said lumber to be insured for the sum of \$25.00 per thousand feet thereof, the loss thereon to be made payable to the defendant. That it was understood and intended by the parties thereto at all of said times that the risk of loss by fire of said lumber should not be upon the defendant and the parties thereto at all times acted upon, treated, understood and interpreted and by their conduct practically construed said contract as having the force and effect hereinbefore alleged and set out.

## VI.

That defendant duly performed all of the condi-



tions of said contract on its part to be performed and that after the making of said contract and on or about the date thereof, the defendant loaned to the plaintiffs the sum of \$40,000 and advanced said sum on account of 2,000,000 feet of lumber then on hand and manufactured in the said sawmill yard of the plaintiffs, which said advance and loan was made in compliance with the provisions of said contract, and that to secure said loan, the plaintiff did on the same day execute and deliver to the defendant a bill of sale describing said lumber, and said lumber was thereupon stenciled with the name of the [45] defendant. That thereafter and between the date of the said contract and the 3d day of August, 1920, the plaintiff sawed, cut and manufactured at said sawmill 1,338,412 feet of lumber pursuant to the terms of said contract, and prior to the same date the defendant advanced and loaned to the plaintiffs in the manner provided in said contract, the sum of \$20.00 per thousand feet upon said lumber so manufactured as aforesaid and as security for said loans received bills of sale therefor from the plaintiffs, and said lumber was stenciled with the name of the defendant. That the said loans and advancements so made by the defendant to the plaintiffs as aforesaid upon said 1,338,412 feet of lumber were made as follows, to wit: Defendant advanced and loaned to the plaintiffs \$17,835.52 on the 28th day of June, 1920, being an advance or loan of \$20.00 per thousand feet upon 891,776 feet of lumber; defendant advanced to plaintiffs \$8,932.72 on the 3d day of August, 1920,



being an advance or loan of \$20.00 per thousand upon 446,636 feet of lumber. That between the date of said contract and the said 3d day of August, 1920, the defendant, pursuant to the terms of said contract, sold ten cars of lumber from said sawmill yard containing 283,129 feet of lumber, for and on account of the plaintiffs, for the highest market price obtainable, and after deducting from the price received by defendant for the said ten cars of lumber the fifteen per cent commission provided for in said contract, the trade discount of two per cent, and \$20.00 per thousand feet of said lumber to repay the defendant for the amounts previously advanced upon the lumber in said cars, paid the balance to the plaintiffs by crediting the same to plaintiffs account with plaintiffs consent as hereinafter alleged.

## VII.

That on the 3d day of August, 1920, and at the time of the fire hereinafter referred to, the plaintiffs saved and preserved from loss by fire one carload of lumber hereinbefore described and referred to, which carload contained 39,345 feet and that thereafter and on or about the 12 day of August, 1920, defendant sold and [46] marketed said carload of lumber for and on account of the plaintiffs in the same manner as defendant had previously marketed said ten cars of lumber hereinbefore described upon the same terms, and that by reason thereof defendant was able to and did deduct from the amount remitted to the plaintiffs the sum of \$20.00 per thousand upon 39,345 feet of lumber

in said car whereby and by reason of which the plaintiffs became and are entitled to a credit upon the said loans of \$786.90 as of the date of August 12, 1920. That the dates of shipment, the number of feet contained in each car and the amount of credit due plaintiffs on account thereof on account of the ten cars hereinbefore referred to and shipped and marketed between the date of said contract and said 3d day of August, 1920, were as follows, to wit: *One* the 29th day of June, 1920, one car containing 21,048 feet was shipped and marketed and on account thereof plaintiffs became and are entitled to a credit as of that date of \$420.96; on the 1st day of July, 1920, one car containing 25,597 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit on said loans of \$511.94 as of that date; on the 1st day of July, 1920, one car containing 27,938 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit upon said loans of \$558.76 as of that date; that on the 10th day of July, 1920, one car containing 26,269 feet and one car containing 28,510 feet of lumber were shipped and marketed whereby plaintiffs became and are entitled to credit upon said loans of \$525.38 and \$570.20 resuectively as of that date; that on the 12th day of July, 1920, one car containing 36,937 feet and one car containing 34,272 feet of lumber were shipped and marketed whereby plaintiffs became and are entitled to credits of \$738.74 and \$685.44 respectively as of said date; that on the 30th day of July, 1920,

one car containing 27,699 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to credit upon said loans of \$533.98 as of that date; that on the 1st day of August, 1920, one car containing [47] 27,200 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit on account of said loans of \$544 as of that date; that on the 3d day of August, 1920, one car containing 27,659 feet of lumber was shipped and marketed whereby plaintiffs became and are entitled to a credit of \$553.18 upon said loans as of that date.

#### VIII.

That on the said 3d day of August, 1920, there remained at the said sawmill yard after the shipment of said ten cars of lumber and exclusive of the carload of lumber thereafter shipped as aforesaid on the 12th day of August, 1920, and owned by the plaintiffs and upon which the defendant had, previous to that time, advanced and loaned the plaintiffs under the terms of said contract the sum of \$20.00 per thousand feet, and the said plaintiffs were then indebted to the defendant on account of the said advances and loans of \$20.00 per thousand feet upon said lumber then remaining in said mill yard as aforesaid in the sum of \$75,398.45, together with interest thereon at the rate of seven per cent per annum from the dates the respective advances were made as aforesaid.

#### IX.

That on said 3d day of August, 1920, the said 3,015,938 feet of lumber was destroyed by fire and

that by reason thereof it became and was rendered impossible for the defendant to sell or market the said lumber in the manner provided by the said contract and it became impossible for the defendant to reimburse itself for the advances so made out of the sale price of said lumber and the subject matter of the said contract in so far as it related to the said 3,015,938 feet of lumber and the advances made thereon, was destroyed and by reason thereof the said sum of \$20.00 per thousand feet upon said 3,015,938 feet of lumber together with interest thereon as aforesaid became immediately due and payable from the plaintiffs to the defendant and defendant thereupon became entitled to recover the said [48] sum so advanced and loaned by them from the plaintiffs.

X.

That subsequent to the said 3d day of August, 1920, defendant continued to perform its obligations under the said contract and duly performed all of the conditions of said contract on its part to be performed and that subsequent to the 3d day of August, 1920, and prior to the 8th day of November, 1920, the plaintiffs cut, sawed and manufactured 1,615,786 feet of lumber under the terms of said contract and defendant loaned and advanced to the plaintiffs upon the said lumber the sum of \$20.00 per thousand feet thereof, which loans and advances were made as follows, to wit: The sum of \$10.-289.98 was loaned on the 2d day of September, 1920, on account of 514,499 feet of lumber, the sum of \$8,026.30 was loaned on the 30th day of Septem-

ber, 1920, on 401,315 feet of lumber, the sum of \$13,999.44 was loaned on the 8th day of November, 1920, on 699,972 feet of lumber by defendant's then crediting to the plaintiffs that sum of money as a payment upon the sums then due the defendant from the plaintiffs and defendant, at the time of making and allowing said credit, notified the plaintiffs that said credit had been made.

## XI.

That plaintiffs are entitled to credit upon the said amounts so due as aforesaid by reason of the remainder or balance received upon the purchase price of the eleven carloads of lumber referred to in paragraph VI hereof, and that the remainders or balances so received and credited to plaintiffs by the defendant, and the dates of the same, were as follows: On the 16th day of September, 1920, the sum of \$1,159.19; on the 21st day of September, 1920, the sum of \$414.45; on the 5th day of November, 1920, the sum of \$518.36; and on the 22d day of December, 1920, the sum of \$257.64. That no sums whatever other than the sums above stated, have been paid defendant upon plaintiffs said account and indebtedness. [49]

## XII.

That prior to and at the time of the commencement of this action the plaintiffs caused said 1,615,786 feet of lumber to be taken possession of by the sheriff of Flathead County, Montana, and wrongfully caused the same to be attached and seized, thereby rendering it impossible for the plaintiffs to perform their said contract or to ship



or consign the said lumber so that defendant might sell the same on account of the plaintiffs, and rendered the performance of said contract by the parties hereto wholly impossible, by reason of which it became and is impossible for the defendants to sell said lumber and to procure reimbursement for the loan of \$20.00 per thousand feet upon said lumber, and on account thereof the said sum of \$20.00 per thousand feet upon all of said 1,615,786 feet of lumber became immediately due and payable from the plaintiffs to the defendant together with interest thereon at the rate of seven per cent per annum from the dates of the respective loans and advances hereinbefore alleged and set out.

### XIII.

That the defendant, prior to the commencement of this action demanded payment of the sums so due, as aforesaid, from the plaintiffs, and that plaintiffs have not paid said sums, or any part thereof, and by reason of the premises plaintiffs are indebted to the defendant in the sum of \$32,224.72 together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them, on account of this defendant's eighth cause of action, for the sum of \$32,224.72 together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920, and for defendant's costs herein expended.



## COUNT NUMBER NINE.

For further answer to plaintiffs' complaint and by way of counterclaim and as a ninth cause of action against the plaintiffs, [50] defendant alleges:

## I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

## II.

That at all times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and citizens and residents of the State of Montana.

## III.

That on or about the 15th day of April, 1920, plaintiffs and defendant entered into the contract hereinbefore described and referred to in paragraph III and IV of Count Number Four hereof, to which reference is hereby made and which is by reference made a part hereof as if set forth at length in this paragraph.

## IV.

That thereafter plaintiffs and defendant entered upon the performance of said contract and the defendant duly performed all of the conditions of said contract on defendant's part to be performed, but that the plaintiffs, disregarding their obliga-

tions under said contract, breached and failed to perform the same in the following particulars, among others, to wit:

V.

That on the 3d day of August, 1920, there was in said sawmill yard and subject to the said contract 3,015,938 feet of lumber upon which defendant had advanced and loaned to plaintiffs the sum of \$20.00 per thousand feet and that said lumber was insured against loss by fire with loss payable to the plaintiffs or defendant as their interests might appear for the sum of \$70,000 and no more, and that the plaintiffs failed, neglected and refused [51] to keep the said lumber insured against loss by fire for \$25.00 per thousand feet and failed and neglected to provide insurance against loss by fire in that amount with the loss payable to the defendant, and that the plaintiffs, contrary to the provisions of said contract, further insured said lumber against loss by fire in the sum of \$60,000 with the loss payable to the plaintiffs and to no other persons.

VI.

That the said lumber, to wit, 3,015,938 feet thereof was on said 3d day of August, 1920, totally destroyed by fire and that the insurers thereof upon the policies of insurance aforesaid paid the sum of \$130,000 on account of the said loss, \$60,000 of which sum was paid to the defendant and \$70,000 was paid to and received by the plaintiffs, and retained and appropriated by plaintiffs to their own use, and plaintiffs failed, refused and neglected

to pay the same or any part thereof to the defendant. That by reason thereof defendant was damaged in the sum of \$15,398.45.

## VII.

That plaintiffs further broke and failed to perform the obligations of said contract, in that, at the time of and prior to the commencement of this action, plaintiffs had cut, sawed, manufactured and piled in their sawmill yard 1,615,786 feet of lumber under the terms of said contract and upon said lumber the defendant had, prior to the commencement of this action, advanced and loaned to the plaintiffs the sum of \$20.00 per thousand feet as provided in the said contract and agreement, and that at the time of commencing this action and prior thereto, the plaintiffs, disregarding their duty and obligation to load and ship said lumber upon the orders of the defendant, wrongfully caused all of said lumber to be seized and taken possession of by the sheriff of Flathead County, Montana, and to be attached and thereby disabled themselves from performing the obligations of said contract and thereby prevented [52] this defendant from selling and disposing of the same as provided in said contract and prevented the defendant from earning a commission of fifteen per cent upon the sale price thereof. That had it not been for the said seizure and attachment of said property as aforesaid, defendant would have been able to sell and dispose of the same for a price of \$25.00 per thousand feet and defendant would have been able to have earned a commission thereon of fifteen

per cent of said price, which would have amounted to the sum of \$6,059.20.

WHEREFORE, defendant prays judgment against the plaintiffs on this, defendant's ninth cause of action, for the sum of \$21,457.65 together with interest thereon at the rate of eight per cent per annum from the date of the commencement of this action together with the defendant's costs herein expended.

### COUNT NUMBER TEN.

For further answer to plaintiffs' complaint and by way of counterclaim and as a tenth cause of action against the plaintiffs, defendant alleges:

#### I.

That the defendant is and was at all the times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Missouri, with its principal place of business in Kansas City in said state.

#### II.

That at all the times herein mentioned the plaintiffs were and still are copartners in the business of dealing in, manufacturing and selling lumber in the State of Montana and elsewhere under the firm name and style of Donlan and Henderson, and residents and citizens of the State of Montana.

#### III.

That on or about the 15th day of April, 1920, the plaintiffs and defendant entered into a contract or agreement, whereby defendant agreed to lend the plaintiffs the sum of \$20,000, for which sum plaintiffs agreed to give to the defendant their notes, [53]

and defendant agreed to advance and lend to the plaintiffs certain sums of money to be determined, loaned and computed as follows, to wit: Defendant agreed to advance and lend to the plaintiffs at the time of the making of said contract a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in piles at plaintiffs' saw-mill yard at Fletcher's Spur near Pablo, Flathead County, Montana, and defendant agreed to advance and lend to the plaintiffs on or before the 10th day of each month thereafter during the life of said contract a sum equal to \$20.00 per thousand feet on all lumber sawed, cut and manufactured by the plaintiffs after the date of the said contract and prior to the 10th day of each succeeding month during the life of said contract, said loans and advancements to be based upon an inventory of finished piles of lumber in said mill yard, which inventory was to be taken on or before the 10th day of each succeeding month during the life of said contract. That it was further provided by the said contract that as security for the loans and advancements so to be made by the defendant as aforesaid, the plaintiffs would give to the defendant at the time of each of said loans and advancements bills of sale describing the lumber on account of which the respective advances and loans were made, it being the intention of the parties thereby to give and receive said bills of sale as security and as evidence to a factor's lien. That it was further provided in said



contract that one-half of the loans or advances upon lumber to be thereafter manufactured should be applied by the parties in payment of the said notes for \$20,000 until such time as said notes should be paid in full, and it was agreed under and by the terms of said contract that the defendant should market and sell said lumber for and on account of the plaintiffs at the highest market prices obtainable at the times of making such sales and that the proceeds of said sales should be paid to the plaintiffs after deducting from the price at which said sales were made the necessary [54] freight and railroad charges, a trade discount of two per cent, a commission of fifteen per cent to be paid to or deducted by the defendant for the defendant's services in making said sales, and the sum of \$20.00 per thousand feet loaned or advanced by defendant on account of the said lumber as provided in said contract.

It was further provided by said contract that the said sums of \$20.00 per thousand feet upon said lumber should be repaid to the defendant out of sales of said lumber to be made in the manner aforesaid and plaintiffs agreed to pay the defendant interest upon said loans and advances at the rate of seven per cent per annum.

That it was further agreed by the said contract that all of said loans so to be made by the defendant to the plaintiffs herein should bear interest at the rate of seven per cent per annum from and after the date the said loans should be made until



paid, and it was further agreed that the plaintiffs should deliver said lumber f. o. b. cars at said Fletcher's Spur, and should dress the same, if required, as the defendant should direct and order and at such times as defendant should direct and order in order that defendant might be enabled to sell said lumber for and on behalf of the plaintiffs.

Said contract further provided that the plaintiffs would, at their own expense, cause all of said lumber manufactured by them or to be manufactured by them as aforesaid to be insured and to be kept insured at all times against loss by fire for the sum of \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That said contract further provided and it was by and through said contract agreed between the parties thereto that in the event that any of said lumber should be lost or destroyed by fire at any time after defendant should have loaned or advanced money thereon, then and in that event, said insurance of \$25.00 per thousand feet of said lumber so destroyed should be paid to the defendant in liquidation of its loss and damage on account of the [55] advances made upon said lumber, and on account of the loss and damage which defendant would in that event suffer by reason of the trouble and expense to which defendant would have been put in the performance of the said contract with reference to the lumber so destroyed by fire and on account of the loss and damage which defendant would suffer in that event by reason of defendant's

inability to collect or procure its commission for the sale of lumber so destroyed by fire.

IV.

That therefore, and on the same day, the plaintiffs and defendant entered upon the performance of said contract and duly made the loans and advancements agreed to be made by defendant at the time of the making of said contract, and on said 15th day of April, 1921, the defendant, in performance of the said agreement, loaned to the plaintiffs a sum equal to \$20.00 per thousand feet on all the lumber then owned by the plaintiffs in pile at plaintiffs' sawmill yard at said Fletcher's Spur. That thereafter and on the 16th day of April, 1920, the plaintiffs and defendant, for the purpose and with the intention of making a written memorandum of their said agreement theretofore made as hereinbefore alleged, and for the purpose of putting said contract and agreement in writing, executed an instrument in the words and figures following, to wit:

“CONTRACT OF SALE.

THIS AGREEMENT, made, in triplicate, this 16th day of April, 1920, by and between DONLAN & HENDERSON, a copartnership of Pablo, Missoula County, Montana, hereinafter called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, hereinafter called the vendees.

WITNESSETH.

That said vendors, for and in consideration of

the payments, covenants and agreements, to be made, kept and performed by said vendees as hereinafter contained and specified, do hereby agree to sell and deliver to the vendees, and the vendees hereby agree to buy, All of the lumber now owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flathead County, Montana, and all lumber to be sawed, cut and manufactured by them at such Fletcher Spur sawmill hereafter until the 1st day of January, 1921.

And it is hereby mutually agreed and understood by and between the parties hereto, as follows, to wit:

1. That upon the execution of this contract, the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per thousand feet on all lumber hereby sold and in [56] pile at Fletcher Spur, in accordance with an inventory this day agreed upon; that the vendees shall also loan to the vendors hereon the sum of \$20,000.00, which shall be evidenced by a promissory note of the vendors, and which shall bear interest at the rate of seven per cent per annum from this date until paid as hereinafter specified; and that the vendees shall also pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be hereafter sawed, cut and manufactured by the vendors under and during the terms of this contract, which payment shall be made monthly, based upon an inventory of finished piles in the mill yard taken on or before the 10th day of each month, PROVIDED, however, that \$10.00 per thousand feet of such ad-

vancement shall be applied and credited on the \$20,000.00 promissory note above mentioned, until the principal and interest thereof is fully paid. That the advancement this day made shall bear interest at the rate of seven per cent (7%) per annum from this date, and all other advancements to be made as herein specified shall also bear interest at the same rate from and after the date the same are made and until paid; and such interest shall be computed and adjusted monthly, on or about the 10th day of each month; based upon the balance thereof remaining against the vendors, after deducting such advancements from the sale price on all shipments made, as hereinafter provided.

2. That the vendor shall manufacture and grade said lumber according to the Western Pine Manufacturers Association grading rules and standards, and shall protect and hold the vendees harmless against any claim or loss which may arise under said rules or standard.

That the vendors shall deliver said lumber F. O. B. cars at said Fletcher Spur, either dressed or rough, as directed and ordered by the vendees.

4. That the vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid, the vendees shall pay therefor to the vendors, as the purchase price for said lumber under this contract, the highest market price for which it is sold by them, less 15%; and that when each car of lumber is shipped, the ven-

dors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15% less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced on said lumber as hereinbefore provided, which draft the vendees agree to honor and pay when presented.

5. That upon the payment of the advance of \$20.00 per thousand feet as hereinbefore mentioned, the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable thereon to the vendor for the balance of the purchase price upon completion of the terms and conditions of this contract on the part of the vendors, and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designed as the property of the vendees, from the time it is so marked and bill of sale given.

6. That in the event of a failure on the part of the vendors to carry out this contract, the right is hereby given to the vendees to use the planer of the vendors at said Fletcher Spur to dress the said lumber in order to protect themselves against loss on account of the amounts advanced hereunder.

7. That the vendors hereby lease to the vendees for and during the life of this contract the land upon which said lumber yard is or may be located at said Fletcher Spur, but the [57] vendors may retain the right to occupy and use the



same for the purpose of this contract.

8. That the vendors shall at their own expense during the life of this contract, keep insured against loss by fire, all lumber hereby sold and which shall be in the yard, for \$25.00 per thousand feet, the loss thereon to be made payable to the vendees.

9. That this contract and every provision thereof shall extend to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the said parties have hereunto set their hands and seals this 16th day of April, 1920.

DONLAN AND HENDERSON,

By BEN W. HENDERSON.

TURNER, DENNIS & LOWRY LUMBER  
COMPANY.

By THOS. S. DENNIS,

Secy. & Treas.

Attest: \_\_\_\_\_

Secretary."

V.

That it was intended by the plaintiffs and defendant in executing the said instrument hereinbefore set out, to put into written form their agreement hereinbefore described in paragraph III hereof and that at and before the making and execution of said written instrument, this defendant and the plaintiffs intended that said instrument should mean and that the legal consequences thereof should



be as set forth and described in paragraph III hereof.

That through a mutual mistake of plaintiffs and defendant, the parties to said contract hereinbefore alleged and set out, the said written instrument did not and does not truly state or express the intention of said parties and does not truly express or set out what were intended to be the legal consequences of said written contract, in this, to wit: that said instrument uses the words "vendor" and "vendee" and uses the word "sale" in the title of said instrument, and the words "sell and deliver" and the word "buy" in the second paragraph prior to the paragraph numbered 1, and the word "sold" in the first and eighth numbered paragraphs thereof, whereas it was intended by the parties to said agreement that they should be principal and factor and not vendor and vendee, and that said lumber should be delivered but not sold to the defendant, and that paragraph numbered 8 of said instrument provides that upon the payment of the advance of \$20.00 per thousand feet, the title to said lumber shall pass to the [58] defendant and become their property, whereas no such agreement or understanding was had by and between the parties thereto, and that it was intended and agreed that the plaintiffs should execute and deliver a bill of sale, of said lumber, to the defendant solely as security to secure the defendant for the amounts loaned and advanced upon the said lumber as aforesaid and as evidence of a factor's lien.

That the portions of said written instrument so improperly inserted therein as aforesaid were in-

serted therein by the attorney for the plaintiffs without instructions for either the plaintiffs or the defendant and contrary to the intention of the said parties. That the parties thereto, assuming that said attorney had so drawn said instrument as to express the real contract of the parties and that it provided the legal consequences desired by said parties, being mutually mistaken in such assumption inadvertently executed the same as aforesaid. That the parties thereto at the time of the execution of said instrument and at all times subsequent thereto have treated, acted upon and understood said agreement as alleged and set out in paragraph III hereof, and not otherwise.

That the defendant has duly performed all of the conditions of said agreement on its part to be performed and is now ready; and at all times has been ready to perform all the conditions in said contract on its part to be done and performed and that the true contract, so made and entered into by plaintiffs and defendant as aforesaid is and was in all respects just, reasonable and equitable, and the terms thereof just, adequate and fair and that defendant is entitled to have said written instrument reformed and corrected by the Court to conform to the real contract and agreement between the parties hereto as aforesaid and to this end it has no adequate remedy at law and that the amount herein in controversy in connection with the reformation of said instrument as aforesaid exceeds the sum of \$8,000, exclusive of interest and costs. [59]

## VI.

That thereafter plaintiffs and defendant entered

upon the performance of the said contract and agreement and defendant duly performed all of the conditions of said contract on its part to be performed and on the date of said contract, defendant loaned to the plaintiffs the sum of \$40,000 on account of 2,000,000 feet of lumber then on hand, manufactured and piled in the said sawmill yard, and that thereafter, and prior to the 3d day of August, 1920, the plaintiffs sawed, cut and manufactured at said sawmill 1,338,412 additional feet of lumber pursuant to the terms of said contract, and prior to and upon the said 3d day of August, 1920, defendant advanced and loaned to the plaintiffs upon said additional feet of lumber in the manner provided in said contract the sum of \$20.00 per thousand feet. That from said 2,000,000 feet and said 1,338,412 feet of lumber hereinbefore referred to, plaintiffs shipped eleven carloads of lumber containing 322,474 feet of lumber, and said lumber so shipped was sold by the defendant pursuant to the terms of said contract for and on account of the plaintiffs and the proceeds of said sale were applied as provided in said contract to the payment of a trade discount of two per cent, a commission of fifteen per cent to the defendant for its services in making said sale, to the repayment to defendant of \$20.00 per thousand feet of said lumber so shipped as aforesaid on account of the said sums so previously advanced upon said lumber by the defendant and the remainder of the sale price was duly paid to the plaintiffs by crediting the same to plaintiffs' account as stated in paragraph IX hereof, and that the re-

mainder of said 2,000,000 feet and 1,338,412 feet of lumber over and above the quantity so shipped as aforesaid, that is to say, 3,015,938 feet of lumber was piled at the said sawmill yard on the said 3d day of August, 1920, and at said time and on said date defendant had loaned and advanced to the plaintiffs the sum of \$20.00 per thousand feet upon all of said 3,015,938 feet of lumber. [60]

#### VII.

That by reason of the premises and under the terms of said contract, it was then on said date the duty of the plaintiffs to keep said quantity of lumber insured against loss by fire for \$25.00 per thousand feet, the loss thereon to be made payable to the defendant. That on said date the plaintiffs had insured said lumber for the sum of \$70,000, the loss thereon having been made payable to the plaintiffs or the defendant as their interests might appear, and plaintiffs had insured said lumber for the further sum of \$60,000 against loss by fire, the loss thereon being made payable to the plaintiffs alone and on said date no other insurance against loss by fire had been procured upon the said quantity of lumber.

#### VIII.

That on said 3d day of August, 1920, said 3,015,938 feet of lumber was destroyed by fire and that by reason thereof the defendant became immediately entitled, under the terms of said contract, to have and receive in liquidation of its loss and damage thereby suffered the sum of \$25.00 per thousand feet upon the said 3,015,938 feet of lumber so destroyed

as aforesaid. That on or about the 1st day of October, 1920, the plaintiffs collected the sum of \$70,000 as insurance paid for the loss of said lumber, and thereafter, and on or about the 1st day of November, 1920, plaintiffs collected the further sum of \$60,000 as insurance on account of the loss of said lumber as aforesaid, and that by reason of the premises it was then the duty of the plaintiffs at the time the said respective sums were received to pay to the defendant the sum of \$25.00 per thousand feet upon said 3,015,938 feet of lumber, that is to say, the sum of \$75,398.45; but that said sum has not been paid nor any part thereof, save and except the sum of \$60,000 paid to the defendant by the plaintiffs on the 2d day of October, 1920, and there still remains due and owing to the defendant from the plaintiffs on account of the money collected from insurance upon said lumber as aforesaid, the sum [61] of \$15,398.45, together with interest thereon at the rate of eight per cent per annum from the 1st day of November, 1920, less the sum of \$13,999.44 credited to plaintiffs by the defendant as hereinbefore alleged.

#### IX.

That subsequent to the said 3d day of August, 1920, defendant continued to perform its obligations under the said contract and duly performed all of the conditions of said contract on its part to be performed and that subsequent to the 3d day of August, 1920, and prior to the 8th day of November, 1920, the plaintiffs cut, sawed and manufactured 1,615,786 feet of lumber under the terms of said



contract and defendant loaned and advanced to the plaintiffs upon the said lumber the sum of \$20.00 per thousand feet thereof, which loans and advances were made as follows, to wit: The sum of \$10,289.98 was loaned on the 2d day of September, 1920, on account of 514,499 feet of lumber, the sum of \$8,026.30 was loaned on the 30th day of September, 1920, on 401,315 feet of lumber, the sum of \$13,999.44 was loaned on the 8th day of November, 1920, on 699,972 feet of lumber by defendant's then crediting to the plaintiffs that sum of money as a payment upon the said sums of \$15,398.45 then due the defendant from the plaintiffs as stated in paragraph VIII hereof, and defendant, at the time of making and allowing said credit, notified the plaintiffs that said credit had been made.

X.

That plaintiffs are entitled to credits upon the said amounts so due as aforesaid by reason of the remainder or balance received upon the purchase price of the eleven carloads of lumber referred to in paragraph VI hereof, and that the remainders or balances so received and credited to plaintiffs by the defendant, and the dates of the same, were as follows: on the 16th day of September, 1920, the sum of \$1,159.19; on the 21st day of September, 1920, the sum of \$414.45; and on the 5th day of November, 1920, the sum of \$518.36, and on the 22d day of December, 1920, the sum of \$257.64. That no sums whatever other than the sums above stated have been [62] paid defendant upon plaintiff's said account and indebtedness.

## XI.

That prior to and at the time of the commencement of this action, the plaintiffs caused said 1,615,786 feet of lumber to be taken possession of by the sheriff of Flathead County, Montana, and wrongfully caused the same to be attached and seized, thereby rendering it impossible for the plaintiffs to perform their said contract or to ship or consign the said lumber so that defendant might sell the same on account of the plaintiffs, and rendered the performance of said contract by the parties hereto wholly impossible, by reason of which it became and is impossible for the defendant to sell said lumber and to procure reimbursement for the loan of \$20.00 per thousand feet upon said lumber, and on account thereof the said sum of \$20.00 per thousand feet upon all of said 1,615,786 feet of lumber became immediately due and payable from the plaintiffs to the defendant, together with interest thereon at the rate of seven per cent per annum from the dates of the respective loans and advances hereinbefore alleged and set out, and the plaintiffs are and were at the time of the commencement of this action indebted to the defendant on account of the premises in the sum of \$31,891.03, together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920.

WHEREFORE, defendant prays judgment against the plaintiffs and each of them upon this, its tenth cause of action, that the said written instrument as aforesaid may be reformed to express the true contract of the parties as aforesaid by

substituting the true names of the plaintiffs and defendant hereto for the words “vendors” and “vendees” wherever the same are used in the said instrument, by striking out the words “sell and” in the second paragraph prior to the paragraph numbered 1 in said instrument, by substituting the word “receive” for the word “buy” in the same paragraph, by substituting the word “delivered” for the word “sold” in the first and eighth numbered [63] paragraphs of said instrument, and by striking out of the paragraph numbered 5 of said instrument the words “the title to and” and the words “and become their property” and defendant prays that upon the instrument so reformed and upon this, its tenth cause of action, defendant may have judgment against the plaintiffs for the sum of \$31.891.03, together with interest thereon at the rate of seven per cent per annum from the 22d day of December, 1920, for defendant’s costs herein expended, and for such other relief as may be just and equitable.

WHEREFORE, defendant having fully answered, prays that defendant may recover its costs herein expended and that defendant may have judgment against the plaintiffs in accordance with the prayers of its several causes of action and counter-claims hereinbefore set out.

HALL & POPE,  
Attorneys for Defendant.

State of Montana,  
County of Missoula,—ss.

Charles H. Hall, being first duly sworn says on oath: That he is one of the attorneys for the defend-

ant in the above-entitled action; that said defendant is a corporation of the State of Missouri, and that there is no officer of said corporation within said county of Missoula, at the time this verification is made. That deponent has read the foregoing amended answer and knows the contents thereof and that the same is true to deponent's best knowledge, information and belief.

CHARLES H. HALL.

Subscribed and sworn to before me, this 5th day of May, 1921.

[Seal]

WALTER L. POPE,  
Notary Public for the State of Montana, Residing  
at Missoula, Therein.

My commission expires October 13, 1923.

Service acknowledged June 7, 1921.

HENRY H. PARSON,  
Attorneys for Plaintiffs.

Filed June 7, 1921. C. R. Garlow, Clerk U. S.  
District Court, District of Montana. [64]

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That on April 8th, 1921, Reply was duly filed herein, in the words and figures following, to wit:  
[65]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDER-  
SON, Copartners Doing Business Under the  
Firm Name and Style of DONLAN and  
HENDERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson  
County, Missouri,

Defendant.

### **Reply.**

Come now the plaintiffs and for reply herein to  
defendant's answer deny each and every allegation  
and all allegations therein contained not herein spe-  
cifically admitted to be true.

#### **I.**

Plaintiffs herein for reply to defendant's first  
alleged counterclaim deny each and every allegation  
and all allegations therein contained save and ex-  
cept those herein specifically admitted to be true.

#### **II.**

Plaintiffs admit the allegations of paragraphs  
numbered one (1), two (2), three (3) and four (4)  
in said first counterclaim in said answer contained.

#### **III.**

Replying to paragraph five (5) in said last-men-  
tioned counterclaim, these plaintiffs deny that the  
defendant is the owner and holder of said note or



any part thereof; and in this particular plaintiffs further allege that the said note and the whole thereof, both as to principal and interest, has been and is fully paid, and that the plaintiffs have been and are fully discharged and exonerated from any and all claim, demand or liability thereunder, [66] and that they are entitled to the possession of said note.

### COUNT NUMBER TWO.

Plaintiffs herein for reply to defendant's second alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

#### I.

Plaintiffs admit the allegations of paragraphs numbered (1), two (2), three (3), and four (4) in said second counterclaim in said answer contained.

#### II.

Replying to paragraph five (5) in said last-mentioned counterclaim, these plaintiffs deny that the defendant is the owner and holder of said note or any part thereof; and in this particular plaintiffs further allege that the said note and the whole thereof, both as to principal and interest, has been and is fully paid, and that the plaintiffs have been and are fully discharged and exonerated from any and all claim, demand or liability thereunder, and that they are entitled to the possession of the said note.

### COUNT NUMBER THREE.

Plaintiffs herein for reply to defendant's third

alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1), two (2), three (3), and four (4) in said third counterclaim in said answer contained.

II.

Replying to paragraph five (5) in said last-mentioned [67] counterclaim, these plaintiffs deny that the defendant is the owner and holder of said note or any part thereof; and in this particular plaintiffs further allege that the said note and the whole thereof, both as to principal and interest, has been and is fully paid, and that the plaintiffs have been and are fully discharged and exonerated from any and all claim, demand or liability thereunder, and that they are entitled to the possession of said note.

COUNT NUMBER FOUR.

Plaintiffs replying herein to defendant's counterclaim Number Four deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

I.

Plaintiffs admit the allegations of paragraphs numbered one (1), two (2), and four (4), in said counterclaim and answer contained.

II.

Plaintiffs replying to paragraphs three (3) and five (5) of said counterclaim number four, deny that the legal effect of the said contract as set forth

therein, and deny that either of the plaintiffs or the defendant understood the said contract as therein alleged, and further deny that on the conduct, acts and course of dealing by the parties hereto, or any of them, that it was understood or agreed by the parties hereto, that the defendant was acting only and simply as a factor or broker or that the many bills of sale, or any of them, to said lumber mentioned in said paragraphs were merely given as security or in the nature of mortgages to secure any loans made by the defendant to plaintiffs.

And in this regard the plaintiffs allege that the [68] contract in paragraph four (4) of said counterclaim, and as set forth in plaintiffs' complaint was and is clear, certain and unambiguous; that it was never contemplated by the parties hereto or any of them; that said contract and bills of sale did not convey to and vest in the defendant full and complete title to all of the lumber covered thereby and mentioned in defendant's answer and plaintiff's complaint.

That every loan made by the defendant to plaintiffs was evidenced by a promissory note, executed and delivered to the defendant, three of which are described in the first three (3) counterclaims in its answer, and all of which have been paid; that all other payments made by the defendant to plaintiffs were payments on the purchase price of said lumber, never evidenced by any note of plaintiffs, and was to defendant's knowledge and by mutual consent credited on plaintiffs' books as cash on said purchase price; and

in the said contract itself the defendant reserved the use of plaintiffs' yard and planer to complete and finish the dressing and manufacture of defendant's said lumber to protect it against loss or damage in the event that plaintiffs should stop manufacturing and delivering lumber under the said contract; and that during all of the said time or period since the execution and delivery of said contract of sale, the parties hereto have construed the same according to its tenor and four corners alone, and have treated each other as vendors and vendee, and in no other or different capacity.

That by reason of the premises the defendant herein is estopped to assert and claim that the said lumber so described in the complaint and answer herein was not that of the defendant alone.

### III.

Plaintiffs replying to paragraph six (6) in said counterclaim contained admit that the defendant paid, but deny that it loaned, Forty Thousand (\$40,000) Dollars on account of the [69] two million (2,000,000) feet of lumber then on hand, manufactured and piled in the said sawmill; admit that thereafter and prior to the 3d day of August, 1920. plaintiffs sawed, cut and manufactured at said mill one million three hundred thirty-eight thousand four hundred twelve (1,338,412) additional feet of lumber under said contract; admit that the defendant shipped through the plaintiff eleven (11) carloads of lumber, containing three hundred twenty-two thousand four hundred seventy-four (322,474) feet.

Plaintiffs further allege that only ten (10) cars, containing a total of two hundred eighty-four thousand thirty-five (284,035) feet of lumber, were shipped prior to the said fire on the 3d day of August, 1920, and that at the time of said fire there were in said yards three million fifty-four thousand three hundred seventy-seven (3,054,377) feet of lumber, on all of which the defendant had paid as part of the purchase price the sum of Twenty Dollars (\$20) per thousand feet, and for which it had received bills of sale under which title and possession passed to it, and it took actual possession thereof and became the owner thereof; and that the defendant herein at no time or under any circumstances loaned any money to these plaintiffs whatsoever upon said timber or any part thereof.

#### IV.

Admit allegations of paragraph seven (7).

Replying to said paragraph further, plaintiffs allege that there were three insurances of said lumber as follows: the first and last insurance papers payable to the parties hereto as their interests might appear, but that in one, the insurance for Sixty Thousand (\$60,000) Dollars, was through inadvertence—the same having been ordered over long distance telephone from Pablo, Montana, to Spokane, Washington,—made and given in the name of the plaintiffs alone; and in this connection the plaintiffs [70] further aver and allege that defendant was advantaged and not injured or damaged thereby.



V.

Replying to paragraph eight (8) in said counterclaim, plaintiffs admit that on the 3d day of August, 1920, there were three million fifteen thousand nine hundred thirty-eight (3,015,938) feet of lumber destroyed by fire; plaintiffs further allege that at said time of said fire the title to said lumber and to every part thereof as well as the possession inhered and vested in this defendant, and that plaintiffs voluntarily and temporarily advanced and loaned to the defendant, and charged its account with, said sum of Sixty Thousand (\$60,000) Dollars, in course of the general transactions which are the subject of the plaintiffs' causes of action in their complaint herein; and by reason thereof defendant has been temporarily advantaged instead of injured thereby.

VI.

Replying to paragraph nine (9) of said counterclaim, plaintiffs deny that the defendant herein continued in any manner to perform and discharge the conditions of said contract on its part to be performed and discharged; that it breached its said contract in failing to pay for the lumber sold and delivered to it; that under the terms of said contract the purchase price for the same, after delivery thereof, should have been paid to the plaintiffs, and, in this regard, plaintiffs allege that on the — day of November, 1920, a draft for the sum of Thirteen Thousand Nine Hundred Ninety-nine and Forty-four One Hundredths (\$13,999.44) Dollars was drawn upon the defendant by the plaintiffs for

lumber manufactured, piled, stacked, delivered and sold to the defendant, which said sum was a part of the purchase price thereof due to the plaintiffs under said contract, to wit, Twenty Dollars (\$20) per thousand feet, and that under said contract the defendant herein had no right whatsoever to keep and retain said Thirteen Thousand [71] Nine Hundred and Ninety-nine and  $44/100$  (\$13,999.44) Dollars, but were obligated to pay the same to the plaintiffs on honor of said draft or otherwise in cash.

In this regard plaintiffs deny that they ever conceded to or consented to the retention or keeping by the defendant of said Thirteen Thousand Nine Hundred Ninety-four and  $44/100$  (\$13,999.44) Dollars, but has at all times demanded of the defendant that it pay the same under the terms and conditions of said contract.

Further replying to said paragraph (9) of said counterclaim, the plaintiffs admit that the sum of Ten Thousand Two Hundred Eighty-nine and  $98/100$  (\$10,289.98) Dollars was paid to the plaintiffs by the defendant on the 2d day of September, 1920, on account of five hundred fourteen thousand four hundred ninety-nine (514,499) feet of lumber, and further admit that the sum of Eight Thousand Twenty-six and  $30/100$  (\$8,026.30) Dollars was paid to them by the defendant on the 30th day of September, 1920, on four hundred one thousand three hundred fifteen (401,315) feet of lumber, but in this regard plaintiffs allege that the said sums were not in any sense loans nor was any part thereof a

loan, but that the whole and the total amount thereof was paid as advances and as part purchase price for the said lumber so manufactured, piled, sold, delivered to and accepted by the defendant, to wit, at the rate of Twenty Dollars (\$20) per thousand feet thereof.

## VII.

Plaintiffs replying to paragraph ten (10) of said counterclaim deny specifically that the credits herein named are the only credits to which these plaintiffs are entitled and in respect thereto allege on information and belief the amounts therein contained and named are the net amounts after improperly deducting charges of demurrage, charging plaintiffs with commissions in [72] violation of said contract, deducting a trade discount, and commission of fifteen (15%) per cent, and other improper deductions unknown to these plaintiffs; and in that regard plaintiffs say that they are entitled to far greater allowances and were entitled to payments not shown or alleged in defendant's answer.

## VIII.

Plaintiffs herein replying to paragraph eleven (11) of said counterclaim admit that they caused said one million six hundred fifteen thousand seven hundred eighty-six (1,615,786) feet of lumber to be attached and taken possession of by the Sheriff of Flathead County; and in that regard plaintiffs allege that the defendant has also under its answer herein had the same property attached, and on information and belief states that the

same is now in the care, custody and control of United States Marshal.

Further replying to said paragraph, plaintiffs deny each and every allegation and all allegations therein contained, and specifically do they deny that they are indebted to the defendant in the sum of Thirty-one Thousand Eight Hundred Ninety-one and 03/100 (\$31,891.03) Dollars or in any other sum or amount at all.

#### COUNT NUMBER FIVE.

Plaintiffs herein for reply to defendant's fifth alleged counterclaim, deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

##### I.

Plaintiffs admit the allegations in paragraphs one (1) and two (2) in said alleged counterclaim contained.

##### II.

Replying to paragraph three (3) in said counterclaim, [73] plaintiffs admit receipt of Forty Thousand (\$40,000) Dollars on the 15th of April, 1920, but allege that the same was not a loan but a part payment on the purchase price of said lumber; plaintiffs admit the receipt of Seventeen Thousand Eight Hundred Thirty-five and 52/100 (\$17,835.52) Dollars on the 20th day of June, 1920, but allege that Eight Thousand Nine Hundred Seventeen and 76/100 (\$8,917.76) Dollars thereof was not a loan but was a cash advance and part payment of the purchase price of the said lumber described in plaintiffs' complaint.

III.

Plaintiffs admit receipt of Eight Thousand Nine Hundred Thirty-two and 70/100 (\$8,932.70) Dollars on the 3d day of August, 1920, but allege that one-half ( $\frac{1}{2}$ ) thereof was a cash advance and part payment on the said purchase price of lumber, and that the other one-half of said two last-mentioned items were not paid in cash but were credited upon the notes of these plaintiffs; plaintiffs admit the receipt of Ten Thousand Two Hundred Eighty-nine and 98/100 (\$10,289.98) Dollars on the 2d day of September, 1920, and the sum of Eight Thousand Twenty-six and 30/100 (\$8,026.30) on the 30th day of September, 1920, but state and allege that neither of said payments was a loan but that both were advances and payments as part purchase price of the said lumber hereinbefore described. As to the item of Thirteen Thousand Nine Hundred Ninety-nine and 44/100 (\$13,999.44) Dollars, alleged to have been paid to these plaintiffs on the 8th of November, 1920, plaintiffs generally and specifically deny, and allege that the said sum was to and should have been paid to these plaintiffs by the defendant; that a draft was drawn on the defendant therefor, but payment has been and still is refused.

Further replying to said paragraph three (3), [74] plaintiffs allege that the remainder of the items mentioned in said paragraph are inaccurate and incorrect; that there are wrongful deductions for commissions, for freight charges, for demurrage and the like made from the said items, and that in



truth and in fact the sum so due on all those items, save the item of Sixty Thousand (\$60,000) Dollars, with which plaintiffs should be credited on ten (10) cars of lumber, is Nine Thousand Thirty-four and 12/100 (\$9,034.12) Dollars, and on the eleventh car of lumber plaintiffs state on information and belief they should be credited with Twelve Hundred (\$1,200) Dollars, making a total credit of Ten Thousand Two Hundred Thirty-four and 12/100 (\$10,234.12) Dollars.

Plaintiffs deny generally and specifically that they are indebted to the defendant in the sum of Thirty-two Thousand Two Hundred Twenty-four and 72/100 (\$32,224.72) Dollars, or in any other sum whatsoever or at all.

#### COUNT NUMBER SIX.

Plaintiffs herein for reply to defendant's sixth alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

##### I.

Plaintiffs admit the allegations of paragraphs numbered one (1) and (2) in said sixth counterclaim in said answer contained.

##### II.

Replying to paragraph numbered three (3) in said alleged counterclaim, plaintiffs deny each and every allegation and all allegations therein contained.

##### III.

Replying to paragraph four (4), plaintiffs allege [75] that any and all moneys due or ever due

from the plaintiffs to the defendant have been and are fully paid and plaintiffs have been fully exonerated and discharged therefrom.

### COUNT NUMBER SEVEN.

Plaintiffs herein for reply to defendant's seventh alleged counterclaim deny each and every allegation and all allegations therein contained save and except those herein specifically admitted to be true.

#### I.

Plaintiffs admit the allegations of paragraphs numbered one (1) and two (2) in said seventh counterclaim in said answer contained.

#### II.

Plaintiffs deny the allegations of paragraph three (3) in said counterclaim set forth, and allege the facts to be that the plaintiff received, long after the said fire, the total of One Hundred Thirty Thousand (\$130,000) Dollars insurance, which insurance covered and was in payment of the lumber owned by the defendant herein together with several hundred thousand feet of lumber owned by the plaintiffs herein.

### COUNT NUMBER EIGHT.

Plaintiffs replying herein to defendant's counterclaim number eight deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

#### I.

Plaintiffs admit the allegations of paragraphs numbered one (1), two (2) and four (4) in said counterclaim contained. [76]

## II.

Plaintiffs replying to paragraphs three (3) and five (5) of said counterclaim number eight, deny that the legal effect of the said contract as set forth therein and deny that either of the plaintiffs or the defendant understood the said contract as therein alleged, and further deny that on the conduct, acts and course of dealing by the parties hereto, or any of them, that it was understood or agreed by the parties hereto that the defendant was acting only and simply as a factor or broker or that the many bills of sale; or any of them, to said lumber mentioned in said paragraphs were merely given as security or in the nature of mortgages to secure any loans made by the defendant to plaintiffs.

And in this regard the plaintiffs allege that the contract in paragraph four (4) of said counterclaim, and as set forth in plaintiffs' complaint was and is clear, certain and unambiguous; that it was never contemplated by the parties hereto or any of them, that said contract and bills of sale did not convey to and vest in the defendant full and complete title to all of the lumber covered thereby and mentioned in defendant's answer and plaintiffs' complaint.

That every loan made by the defendant to plaintiffs was evidenced by a promissory note, executed and delivered to the defendant, three of which are described in the first three (3) counterclaims in its answer, and all of which have been paid; that all other payments made by the defendant to plain-

tiffs were payments on the purchase price of said lumber, never evidenced by any note of plaintiffs, and was to defendant's knowledge and by mutual consent credited on plaintiffs' books as cash paid on said purchase price; that in the said contract itself the defendant reserved the use of plaintiffs' yard and planer to complete and finish the dressing and manufacture of defendant's said lumber to protect it against loss or damage in the event that plaintiffs [77] should stop manufacturing and delivering lumber under the said contract; and that during all of the said time or period since the execution and delivery of said contract of sale, the parties hereto have construed the same according to its tenor and four corners alone, and have treated each other as vendors and vendee, and in no other or different capacity.

That by reason of the premises the defendant herein is estopped to assert and claim that the said lumber so described in the complaint and answer herein was not that of the defendant alone.

### III.

Replying to paragraph six (6) of said counterclaim number eight, plaintiffs deny that the defendant performed conditions under said contract to be performed; deny that it loaned the plaintiffs herein the sum of Forty Thousand (\$40,000) Dollars, and in that regard plaintiffs allege that the said Forty Thousand (\$40,000) Dollars was received by them from the defendant, but that the same was in part payment of the purchase price of said lumber.

Plaintiffs further deny that the said bill of sale for the said lumber, described in said paragraph, was in the nature of a mortgage or as security for the amounts paid per thousand on said lumber, but in that regard state the facts to be that the said lumber had been delivered to and accepted by the defendant, was in its possession, and it was the sole and exclusive owner thereof.

Further replying to said paragraph, plaintiffs admit that they sawed between the date of said contract and the 3d day of August, 1920, and had stacked at the said mill, one million three hundred thirty-eight thousand four hundred twelve (1,338,412) feet of lumber; plaintiffs deny that the defendant loaned to the plaintiffs the sum of Twenty (\$20) Dollars [78] per thousand thereon or any other sum thereon, but allege that all sums paid were in the nature of advancements on and in part payment of the purchase price thereof.

Plaintiffs further admit that on June 28, 1920, they received from the defendant Seventeen Thousand Eight Hundred Thirty-five and 52/100 (\$17,835.52) Dollars, but allege that only one-half (1/2) thereof was a loan, which, by agreement of the parties, was to be credited on plaintiffs' notes, sued on in the first three counts of defendant's counterclaim, and that the other half thereof was paid to the plaintiffs as an advance on the said part purchase price for the said lumber so stacked, owned and possessed by the defendant.

Plaintiffs further admit receipt of Eight Thousand Nine Hundred Thirty-two and 72/100 (\$8,-



932.72) Dollars, on the 3d day of August, 1920, but allege that that also was not a loan but was advanced as part of the purchase price of the lumber so purchased, owned and possessed by the defendant, and allege in this regard further that only one-half ( $\frac{1}{2}$ ) of that sum was paid as the purchase price, while the other half thereof was, by agreement of the parties, to be credited on the notes so sued on in defendant's answer and counterclaim.

Plaintiffs deny that defendant sold the said lumber for or on account of the plaintiffs, but allege that the defendant sold the same on its own account, and that plaintiffs herein are entitled to an accounting from the defendant for the entire transaction covering such last mentioned sum.

#### IV.

Replying to paragraph seven (7) of said last-mentioned counterclaim, plaintiffs admit that one car of lumber was preserved from the fire and that it contained thirty-nine thousand three hundred forty-five (39,345) feet of lumber; plaintiffs further allege that the defendant has never accounted to the [79] plaintiffs for said car of lumber or any part thereof, nor for the proceeds thereof, and on information and belief plaintiffs state that the said defendant is indebted to the plaintiffs on said car in the sum of Twelve Hundred (\$1,200) Dollars, and that plaintiffs are entitled to an accounting therefor. Plaintiffs deny that they have any knowledge or information as to what was done with said car of lumber.

Further answering said paragraph, plaintiffs al-

lege that the remaining sums mentioned and stated in said paragraph are inaccurate and incorrect; that the defendant herein has wrongfully charged plaintiffs for delays, excess freight, demurrage and other charges the exact amounts of which are to plaintiffs unknown and that plaintiffs are entitled to a full accounting from the defendant therefor.

## V.

Plaintiffs deny each and every allegation and all allegations in paragraph eight (8) of said counterclaim contained.

## VI.

Replying to paragraph nine (9) in said counterclaim contained plaintiffs admit that there were destroyed three million fifteen thousand nine hundred thirty-eight (3,015,938) feet of lumber in the said fire on August 3, 1920, but in that regard allege that there was a greater number of feet destroyed at that time and place, to wit, three million fifty-four thousand three hundred seventy-seven (3,054,377).

Plaintiffs further deny that the said property was the property of the plaintiffs, but, as hereinbefore alleged, state that it was the defendant's property, wholly and exclusively.

Plaintiffs deny each and every other allegation in said paragraph contained.

## VII.

Replying to paragraph ten (10) in said counterclaim [80] contained, plaintiffs allege that the plaintiffs delivered to and gave a bill of sale for one million six hundred fifteen thousand seven hundred eighty-six (1,615,786) feet of lumber, in said yards,

and that the title was vested in and possession thereof taken by the defendant, but they deny that the defendant paid the sum of Twenty Dollars (\$20) per thousand on the said number of feet of lumber, and in that regard allege that the defendant herein paid the plaintiffs the sum of Twenty (\$20) Dollars per thousand for only nine hundred fifteen thousand eight hundred fourteen (915,814) feet, and that they have never paid the balance thereof; that demand has been made therefor and payment has been and still is refused.

#### VIII.

Replying to paragraph eleven (11) of said counterclaim contained, plaintiffs deny each and every allegation therein contained, and in this regard plaintiffs allege that the defendant has not given the plaintiffs due credit for the amount so due them, and that on each of the said sums so named in said paragraph the defendant has wrongfully charged the plaintiffs with excess freight, demurrage, commissions and other charges to the plaintiffs unknown, for which the plaintiffs are entitled to and request an accounting.

#### IX.

Replying to paragraph twelve (12) in said counterclaim, plaintiffs admit that they attached the lumber therein described and in that regard plaintiffs further allege that the defendant has also attached the said lumber in said paragraph contained, on its alleged counterclaim, and the same is now in the possession of the United States Marshal of this state or his keeper or custodian thereof.

Plaintiffs further allege that the said attachment was rightfully made in that the defendant breached its contract with the plaintiffs in this, that it was indebted to the plaintiffs [81] in the sum of Thirteen Thousand Nine Hundred Ninety-nine and 44/100 (\$13,999.44) Dollars, which was due, owing and unpaid to the plaintiffs from the defendant at the time of said attachment; that the defendant further breached its said contract in that the said notes sued in defendant's answer were paid by the plaintiffs and the defendant failed and refused to deliver the same to plaintiffs upon demand.

#### X.

Replying to paragraph thirteen (13) of said counterclaim, plaintiffs deny each and every allegation therein contained.

#### COUNT NUMBER NINE.

Plaintiffs, replying herein to defendant's counterclaim number nine, deny each and every allegation and all allegations therein contained save and except as herein specifically admitted to be true.

#### I.

Replying to paragraphs one (1) and two (2) and three (3), plaintiffs admit the allegations in said paragraphs contained.

#### II.

Plaintiffs deny each and every allegation in paragraphs four (4) and five (5) contained, and in that regard allege that there were three insurance transactions covering said lumber; in the first and third of which insurance policies were taken out to cover the rights of the parties hereto as their respective

interests should appear, and that in the second insurance transaction, through an inadvertence, caused by long distance telephone communication from Missoula County to Spokane, Washington, the policies were made payable to the plaintiffs alone, but in that regard plaintiffs allege that the defendant has no cause for complaint in that they have been fully paid, and [82] overpaid, on all debts, obligations or demands arising out of the transactions mentioned in the pleadings in this case, and the defendant has been benefited and advantaged, and not injured or damaged thereby.

### III.

Replying to paragraph six (6) of said counterclaim, plaintiffs admit that not only three million fifteen thousand nine hundred thirty-eight (3,015,938) feet of lumber were burned on the 3d day of August, 1920, but allege that three million fifty-four thousand three hundred seventy-seven (3,054,377) feet thereof were burned and destroyed at said time and place, all of which belonged to and was in the possession of the defendant; but allege that in addition thereto hundreds of thousands of feet belonging to the plaintiffs were likewise destroyed, all of which lumber belonging to both of the parties hereto, was covered by the said insurance policies; plaintiffs admit collecting one hundred thirty thousand (\$130,000) Dollars from the said policies so covering all of the said timber belonging to the defendant, on the one hand, and to the plaintiffs, on the other, and in that regard say that the defendant



herein has been fully and completely compensated and paid.

Plaintiffs deny that the defendant has been damaged in the sum of Fifteen Thousand Three Hundred Ninety-eight and 45/100 (\$15,398.45) Dollars, or in any other sum of money at all.

IV.

Replying to paragraph seven (7) of said counterclaim, plaintiffs deny each and every allegation therein contained and allege the facts to be, that it is not the proper subject of a counterclaim in that the alleged facts did not arise and exist at the time of the commencement of plaintiffs' cause of action, but that the said attachment was made after the filing thereof by [83] the plaintiffs in the District Court of the Fourth Judicial District in the State of Montana in and for the County of Missoula.

WHEREFORE, plaintiffs pray,

(1) That defendant take nothing by either of his alleged causes of action or counterclaim;

(2) That the plaintiffs have judgment in accordance with the prayer of their complaint, and

(3) For costs and such other, further and different relief as plaintiffs are entitled to.

A. J. VIOLETTE and

HARRY H. PARSONS,

Attorneys for Plaintiffs.

State of Montana,

County of Missoula,—ss.

———, being first duly sworn upon his oath, deposes and says:

That he is one of the plaintiffs named in the above-entitled action; that he has read the foregoing reply and knows the contents thereof; that the same is true of his own knowledge except the matters therein alleged upon information and belief, and as to those he believes it to be true.

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Subscribed and sworn to before me this — day of April, 1921.

[Seal]

\_\_\_\_\_,  
Notary Public for the State of Montana, Residing  
at Missoula.

My commission expires the — day of —, 19—.

Service by true copy admitted this 8th day of April, 1921.

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\_\_\_\_\_,  
Attorneys for Defendant. [84]

Service of the foregoing reply is hereby accepted and acknowledged and a true copy thereof received this 7th day of April, 1921; and the absence of a verification thereof is hereby waived temporarily providing that the same be properly verified at or before trial of said action.

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\_\_\_\_\_,  
Attorneys for Defendants. [85]

State of Montana,  
County of Missoula,—ss.

Harry H. Parsons, being first duly sworn, upon his oath, deposes and says:

That he is the agent and attorney of the plaintiffs, Edward Donlan and Ben W. Henderson, in

the above and foregoing action, and as such has the right, power and authority to make this verification in their behalf; that he has read the above and foregoing reply, knows the contents thereof, and that it is true to his best information, knowledge and belief; that he makes this verification for the reason that at this time one of the plaintiffs, Ben. W. Henderson, is without the county of Missoula, wherein affiant resides, and that the other plaintiff, viz., Edward Donlan, is about forty (40) miles from the city of Missoula, on the Flathead Indian Reservation, and cannot be reached by either telephone or telegraph without sending a messenger some six or seven miles, and that the contents of the above reply are known to both plaintiffs herein, for which reason affiant makes this verification.

HARRY H. PARSONS.

Subscribed and sworn to before me this 8th day of April, 1921.

[Seal]                      THOMAS N. MARLOWE,  
Notary Public for the State of Montana, Residing  
at Missoula.

My commission expires the 9th day of March, 1923. [86]

In the District Court of the United States in and  
for the District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,  
Copartners Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson,  
County, Missouri,

Defendant.

**Affidavit of Ruby Brome.**

State of Montana,  
County of Missoula,—ss.

Ruby Brome, being first duly sworn, upon her  
oath deposes and says:

That she is not interested in the subject matter  
and object of the within action or suit; that she is  
over the age of eighteen years, and that she did, in  
the city and county of Missoula, State of Montana,  
on the 8th day of April, 1921, serve a true and cor-  
rect copy of the above-entitled reply upon Messrs.  
Hall and Pope, attorneys of record for the defend-  
ant therein, by handing to Chas. Hall personally, at  
their offices, a true and correct copy of the same.

Further affiant saith not.

RUBY BROME.

Subscribed and sworn to before me this 8th day of April, 1921.

[Seal]                      THOMAS N. MARLOWE,  
Notary Public for the State of Montana, Residing  
at Missoula.

My commission expires the 9th day of March, 1923.

Filed April 8, 1921. C. R. Garlow, Clerk U. S.  
District Court, District of Montana. [87]

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That thereafter, on August 4th, 1921, the decision of the Court was duly filed herein, in the words and figures following, to wit: [88]

In the District Court of the United States in and  
for the District of Montana.

DONLAN AND HENDERSON

vs.

TURNER, DENNIS & LOWREY LUMBER CO.,  
a Corporation.

**Decision.**

Each party alleges the other's defaults in performance of a somewhat novel written contract made April 16, 1920, which contract is as follows: That plaintiffs "sell" and defendant "buys" some 2,000 M feet of lumber in a local yard and all there "to be . . . cut" to January 1st, 1921; that immediately "the vendees shall pay to the vendors, as an advancement hereon, the sum of \$20.00 per M feet



on all" existing lumber, and "shall also pay and advance" the like sum on future lumber, on inventory by the 10th of each month of piles in the yard; that "the vendees shall also loan to the vendors" \$20,000.00, for which vendors shall execute their note; that to payment of the note, one-half the advance due on future lumber shall be applied by vendee "until . . . fully paid"; that payments or advances and loans shall bear 7% interest per annum "until . . . fully paid," computed and adjusted monthly upon the "balance thereof remaining against the vendors"; that upon "payment of the advance of \$20 . . . the title to and possession of said lumber shall pass to the vendees and become their property, subject only to the balance that will be payable to the vendors for the balance of the purchase price, . . . and the vendors shall give a bill of sale to the vendees therefor and possession thereof, and said lumber shall be marked and designated as the property of the vendees, from the time it is so marked and possession given"; that vendors lease the yard to vendees, subject to the former's use for purposes of the contract; that if vendors fail to perform, vendees have right to use vendors' planer at the yard, "to dress said lumber in order to protect" vendees "against loss on account of the amounts advanced hereunder"; that vendors shall manufacture and grade the lumber in accord with specified rules and standard, hold "vendees harmless against any [89] claim or loss which may arise under said rules or standard," at their expense insure for \$25.00 per M. feet all

lumber sold and in yard, loss payable to vendee, and "shall deliver said lumber F. O. B. cars" at the yard, "either dressed or rough, as directed and ordered by the vendees"; that the "vendees shall market and sell said lumber for the highest market price obtainable at the time of making such sale, and upon the delivery thereof on cars as aforesaid . . . and when each car is shipped, the vendors will render to the vendees an invoice and the original bill of lading, and will draw on them for the amount of such invoice, less 15%, less 2% trade discount, and less \$20.00 per thousand feet already paid and advanced, . . . which draft the vendees agree to honor and pay when presented." The evidence is without material conflict, and the facts, brief and direct, are as follows; there was due performance by both parties, and on August 3, 1920, the lumber in yard on which \$20.00 per M feet had been paid and bills of sale executed, less some 280 M feet shipped, was some 3055 M feet, plaintiffs' unpaid loans, including some \$11,000.00 additional loan in June, represented by notes due at intervals to October 1st, aggregated some \$20,000.00, and the insurance secured by plaintiffs on this and some *other their* lumber, was \$70,000.00 payable to defendant as its interest might appear and \$60,000.00 payable to plaintiffs. That day, an accidental fire destroyed some 3015 M feet of said lumber in the yard, and also other lumber of plaintiffs. The parties continued in performance, but market conditions unfavorable, both parties in need of money, some dispute in reference to insurance, and defend-

ant's attitude, first plainly manifest after the fire, that it was but a selling agent for a commission, created dissatisfaction which culminated in this action commenced on December 20, 1920.

In the *mesne* time plaintiffs had collected all the insurance money, paid \$60,000.00 of it to defendant, at first disputed defendant's right to the stipulated \$25.00 per M feet of the contract, later appeared to acquiesce, but had not accounted for the balance of it at time of action commenced. It appears that from the beginning plaintiffs were less clear than defendant, in conception of the nature of the [90] contract, the relations and the rights it created; and so when defendant's attitude aforesaid developed by self-serving statements mainly, after the fire, plaintiffs either did not perceive its significance or were too ill-advised to contradict or oppose it, for they seemed to acquiesce till suit brought.

After the fire, defendant paid for new cut lumber inventoried in piles and bills of sale given, as follows: \$20.00 per M for some 514 M feet of August cut, by cash without application of any of it to payment of loans to plaintiffs and overdue; the like in respect to some 401 M feet of September cut; \$20.00 per M for some 700 M feet of October cut, by crediting it to plaintiffs' account in respect to the balance of insurance money withheld.

As the 10th of December approached, both parties indicated intent to perform in respect to the November cut, but neither performed.

Throughout the contract, market conditions were unfavorable, and both parties, in hope of im-

provement, acquiesced in few resales and shipments. Ten cars were shipped before the fire, and one car after it, aggregating some 322 M feet. Some of these cars were ordered and shipped before defendant had resold the lumber, and in consequence, before purchasers were found demurrage was incurred in amount some \$600.00.

When plaintiffs commenced this action they attached all said lumber in the yard, and when defendant answered, it also attached the lumber. The pleadings are in accord with the respective theories of the parties and as therein both are in the main in error, and as the action (brought at law, with an equitable defense interposed in the answer, and accounting demanded in the reply) has been tried in the nature of an accounting in equity in respect to a divisible, installment contract, the pleadings need be no more than indicated by brief reference to the theories advanced.

Plaintiffs' is that the contract is of sale for resale, and that they are entitled to recover what they might have received if the *burned* [91] *had* been resold, and to recover the \$20.00 per M feet of the October cut which defendant credited to balance of insurance withheld; and plaintiffs evidently contemplate some accounting in future in respect to said lumber now in yard, when resold by defendant. Defendant's theory is that the contract is of agency for sale, and that it is entitled to recover all factor's advances (the \$20.00 per M. feet paid), expenses, the balance of insurance, and the loans, terminating the contract and accomplishing final settlement.

Both parties abandon certain claims for damages for lost profits, alleged in the pleadings.

To first dispose of defendant's equitable defense of mistake in reducing the contract to writing, and its claim of practical construction in accord with its theory of agency, the mistake was first asserted by it in its amended answer, months after the contract made, performance, destruction of lumber, suit commenced, and is too late. Further, the evidence in support of it is too trifling to warrant discussion; and likewise of the evidence of practical construction, consisting of defendant's belated self-serving statements to that end.

Proceeding to the character of the contract, it has all the elements of sale and only enough of the *indicia* of agency to give some color to a claim of the latter. The lumber inventoried and the \$20.00 per M paid, the absolute property in lumber and money respectively vested in defendant and plaintiffs, beyond return, recall or repayment. Thereafter, plaintiffs have no interest in the lumber save that it be resold for the purposes of the contract, and thereafter the lumber could be attached by defendant's creditors but not by plaintiffs'. Resale is in accordance with defendant's judgment of time, place, person, price and terms, save to be in reasonable time and for the highest reasonably obtainable price. The proceeds are defendants as is any loss of them, plaintiffs having no interest therein but only in the price as the measure of what if anything becomes due them from defendant on resale.



Defendant receives the usual trade discount of a buyer whether or not it concedes it to its [92] vendee on resale. The parties intended and accomplished a sale. The consequences are clear. As owner of the lumber burned, defendant loses its investment therein and its prospective profits, but indemnified to the extent of the stipulated insurance of \$25.00 per M feet, and as owner of the lumber not burned, it is obligated to resell in accordance with the contract. In respect to neither is it entitled to recover from plaintiffs any of the \$20.00 per M by it paid. Nor are plaintiffs entitled to recover what they might have received had the lumber been resold before burned. They sold it to defendant for \$20.00 per M and its promise to resell, whereupon if for a price in excess of the amount due defendant by virtue of the contract, viz., \$20.00 per M plus 17% of the resale price, defendant would pay the plaintiffs the equivalent of such excess. Before resale, no money was due plaintiffs, no debt to them existed. If resale was for an excess price as aforesaid, money would then be due plaintiffs, a debt to them would then be created. The happening of resale alone would determine what if anything was due plaintiffs, the amount, and the time of payment. Defendant's promise to pay was not absolute, but was conditional and plaintiffs' right to payment was not vested but was contingent.

By reason of destruction of the lumber the condition failed, the contingency did not happen, and both the promise and the right expired.

For in these circumstances the law is that the

failure of the event to happen without fault of the promisor, prevents creation of a money debt, terminates the promisee's expectancy of payment, and excuses failure to perform the promise.

See Cases, 13 C. Jur. 114, 631.

A like principle is that if by the express or implied terms of the contract, the promise is conditional on possibility of performance, and performance becomes impossible without fault of the promisor, his liability is discharged.

See Cases 13 C. Jur. 640.

7 Halsbury, Laws of England,  
429. [93]

Still another like principle is that if expressly or by implication to effectuate an intent presumed in good faith and fair dealing, the parties contemplate continued existence of the subject matter of the contract in order to accomplish performance, its destruction without fault absolves both from further performance in so far as dependent upon such continued existence.

See Cases, 13 C. Jur. 643.

7 Halsbury, Laws of England, 430.

These principles are controlling here. The sale of lumber made, it was not known that anything would become due plaintiffs, nor amount, nor when. All were contingent, which to determine defendant promised to resell the lumber. It burned and resale before possible became impossible. The contingencies did not happen, the determination was not made. Defendant's promise became impossible without its fault. It is clear the parties contem-

plated the continued existence of the lumber for resale and to determine all said contingencies, because by the contract thus only were they to be determined.

It will be conceded plaintiffs' right to any payment and how much, depended upon resale for a price in excess of the amount due defendant as aforesaid, and it will be conceded that if values depreciated by reason of time, weather, borers, insects and the like, plaintiffs would lose accordingly. That is, if because thereof the lumber resold for no more than due defendant as aforesaid, though worth more at time of sale, plaintiffs would be entitled to no payment from defendant.

And the same principle that in whole or in part would discharge defendant's promise in these circumstances of partial destruction of the lumber or of its value, in whole discharges it in the instant circumstances of fire and total destruction of the lumber. Both parties understood this and both insured. The 2000 M feet first sold to defendant, contemporaneously cost plaintiffs \$35.00 per M. feet. They received \$20.00 per M from defendant, agreed to insure in defendant's interest for \$25.00 per M and did insure for \$35.00 per M the amount they had paid for the 2000 M. Later, they secured \$60,000.00 more insurance, aggregating on all [94] the lumber, \$55,000.00 more than the \$25.00 per M they agreed to carry for defendant on the lumber burned, and all of which they collected. That some of it was on lumber not sold to defendant, does not

detract from the implication in respect to their understanding aforesaid.

It is urged by plaintiffs that as defendant paid them but \$20.00 per M for the lumber burned, and thereon claim the stipulated insurance of \$25.00 per M, \$5.00 thereof is profit which on some equitable principle it ought to share with plaintiffs even though secured by a resale of the lumber. This cannot be maintained. In any view of the parties' respective interests in the burned lumber, even as other co-owners each could insure their or its interest, without liability to share proceeds with the other.

Of their respective interests, they were of the nature of joint adventurers in the proceeds upon resale of the lumber. If for any fortuitous reason, including market conditions, resale was without excess as aforesaid, plaintiffs received nothing; if resale was with excess, plaintiffs received its equivalent; if resale was for less than due defendant, or if no resale could be made, defendant suffered loss accordingly. This determines the chief issue. In the matter of demurrage and excessive freight, the contract bases plaintiffs' right to payment on resale, on the resale price less express deductions and less the implied deduction, it is agreed, of freight. Defendant ordered lumber loaded and shipped before sold and plaintiff complied.

The cars were consigned to defendant at a destination by it named, and when it resold the lumber, the cars were reconsigned to the destination of the purchasers. In consequence demurrage was in-

curred and freight was increased over that of an original consignment to destination of the purchasers. For demurrage or car rent, defendant is not entitled to credit. It is not freight, and freight is the only expense of resale that is by virtue of the contract a credit in defendant's [95] behalf. Shipment before resale may be a departure from the contract, but although therein plaintiffs waived draft upon defendant for the invoice price, they did not also waive the benefit of the contract's protection to them against all expense of marketing the lumber save freight.

The increased freight is "freight" and is a proper credit in defendant's behalf. When plaintiffs dispatched cars before sale, they knew the likelihood of increased freight and acquiesced therein. All of these shipments have been resold save one now "in storage" in St. Louis. Defendant assumes to credit plaintiffs with their dues in respect to them from a time subsequent to resale on the theory it necessarily awaited freight bills.

The contract required defendant to pay plaintiffs' draft upon shipment. Plaintiffs waived this in respect to lumber shipped before resold, but are entitled to credit from date resale made, whether or not defendant ever received freight bills.

In the matter of the loans, all overdue, defendant is entitled to recover them in amount \$16,171.09, deducting credits to plaintiffs consisting of exchange paid and conceded and amounts due upon resales of lumber.

The notes provide for reasonable attorney's fees,



a cross-complaint being equivalent to a "suit," and \$286.75 are allowed. This is one-half what the local rule in general would allow, but defendant's erroneous attitude in respect to the character of the contract tended to precipitate the litigation and requires the lessening of the ordinary allowance.

In the matter of the insurance of \$25.00 per M for defendant, by plaintiffs collected and in part withheld, defendant is entitled to recover it with interest from date collected, in total amount \$1626.67. Against insurance withheld, defendant properly credited to plaintiffs the payment for the October cut of lumber.

In the matter of interest, defendant is entitled to it in accordance with the contract, but to no interest in respect to payments for lumber save if and when worked out upon resale. [96]

Herein, no account is taken of lumber paid for, bills of sale executed, existing and not resold, including the car in storage, save to determine it is the property of defendant, subject to the contract. Computations are to August 10, 1921, and to conform to the decision the account discloses (and the parties virtually so agree) that \$18,084.51 are due to defendant from plaintiffs. In equity, costs are discretionary, and in view of the circumstances it is believed neither party is entitled to costs.

Decree accordingly.

August 4, 1921.

BOURQUIN, J.

Filed Aug. 4, 1921. C. R. Garlow, Clerk. [97]

That thereafter, on September 3d, 1921, an Additional Memorandum Decision of the Court was duly filed herein, in the words and figures following, to wit: [98]

United States District Court, District of Montana.

DONLAN & HENDERSON

vs.

TURNER etc. CO.

**Additional Memorandum Decision.**

To dispose of disagreements disclosed subsequent to decision, defendant is entitled to freight by virtue of the contract, the parties agree. This includes all legitimate freight and increased freight on reconsignments which plaintiffs knew were necessary and acquiesced in by shipments before sale. Obviously, the trade discount of 2%, like the 15%, is by the contract computed on resale price. The language of the decision in respect to these is palpably wrong, induced by no controversy and inadvertent general comment or illustration.

No principle is known to warrant plaintiffs sharing in defendant's insurance. The case in the Court's mind, Gemstreet Case, 161 Pac. 596, only determines that a fixed present debt must be paid in reasonable time, if the event on which payable, fails.

The decision rewritten, discloses reasons for attorney's fees \$286.75 and no costs. Amount due defendants Aug. 10, 1921, \$18,084.51.

Exchange \$177 conceded by defendant to plaintiff.  
Sept. 3, 1921.

BOURQUIN, J.

Filed Sept. 12, 1922. C. R. Garlow, Clerk U. S.  
District Court, District of Montana. [99]

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That thereafter, on September 22, 1921, Decree and Judgment signed and dated September 21, 1921, was duly filed and entered herein, being in the words and figures following, to wit: [100]

In the District Court of the United States in and  
for the District of Montana.

No. 892.

EDWARD DONLAN and BEN W. HENDERSON  
Copartners Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson  
County, Missouri,

Defendant.

**Judgment and Decree.**

This cause came on to be further heard at this term and was argued by counsel; and the Court having filed its decision wherein and whereby it is found that there is due the defendant from the plaintiffs

the sum of \$18,048.51, such sum including interest computed to August 10, 1921, and in which decision it is further found that title to the 1,615,786 feet of lumber cut after August 3, 1920, mentioned in bills of sale and marked and designated with the name of the defendant, passed to the defendant and became defendant's property, subject to the contract described in the pleadings herein, and that defendant is not entitled to recover in this action the \$20.00 per M paid thereon, and that the plaintiffs should recover nothing upon their complaint herein.

It is therefore ORDERED, ADJUDGED AND DECREED as follows:

That the plaintiffs' complaint and causes of action be dismissed.

That the defendant is the owner of 1,615,786 feet of lumber manufactured by plaintiffs since August 3, 1920, and upon which defendant has advanced and paid \$20.00 per M and for which defendant has received bills of sale, and that such lumber is the property of defendant subject to the contract described in the pleadings herein;

And it is FURTHER ORDERED, ADJUDGED AND DECREED that the defendant have and recover judgment against the plaintiffs, and each [101] of them, for the sum of \$18,221.17, for which execution is awarded the defendant, and that neither party recover its costs herein. Computations extended to date of decree.

Dated September 21st, 1921.

BOURQUIN,  
Judge.

Filed and entered September 22d, 1921. C. R. Garlow, Clerk. [102]

That thereafter, on February 2d, 1922, statement of the evidence was duly approved and filed herein, being in the words and figures following, to wit:  
[103]

# INDEX.

Introductory.....	1
Plaintiffs' Case.....	1- 51
Ben W. Henderson:	
Direct.....	1
Cross.....	7
Redirect.....	19
Recross.....	26
Redirect.....	29
Recross.....	30
Plaintiffs' Exhibit 1 .....	2- 3
Plaintiffs' Exhibit 2 .....	3
Plaintiffs' Exhibit 3 .....	3- 4
Plaintiffs' Exhibit 4 .....	4
Plaintiffs' Exhibit 5 .....	4
Defendant's Exhibit "B".....	9- 10
Defendant's Exhibit "C".....	10- 11
Defendant's Exhibit "D".....	12- 13
Defendant's Exhibit "E".....	15- 16
Defendant's Exhibit "F".....	17- 18
Plaintiffs' Exhibit 6 .....	20
Plaintiffs' Exhibit 7 .....	20- 25
Defendant's Exhibit "G".....	26- 27



Defendant's Exhibit "H".....	27- 28
Defendant's Exhibit "I".....	28- 29
J. P. Lansing:	
Direct.....	30
Cross.....	32
Redirect.....	33
Recross.....	33
Plaintiffs' Exhibit 8.....	33- 36
W. C. Lubrecht:	
Direct.....	36
Cross.....	40
Redirect.....	40
C. H. Richardson:	
Direct.....	41
".....	48
Cross.....	48
Plaintiffs' Exhibit 9.....	41- 44
Plaintiffs' Exhibit 10.....	44- 48
J. P. Flanagan:	
Direct.....	48
Cross.....	49
Redirect.....	50
Ed Donlan:	
Direct.....	50
Plaintiffs Rest.....	51
Defendant's Case.....	51-172
Thomas S. Dennis:	
Direct.....	51
Cross.....	91
Redirect.....	105
Recross.....	105

Defendant's Exhibit "J".....	58
Defendant's Exhibit "K".....	58
Defendant's Exhibit "L".....	61
Defendant's Exhibit "M".....	61
Defendant's Exhibit "N".....	62
Defendant's Exhibit "O".....	62
Defendant's Exhibit "P".....	62- 64
Defendant's Exhibit "Q".....	66
Defendant's Exhibit "R".....	66- 67
Defendant's Exhibit "S" .....	67
Defendant's Exhibit "T".....	68
[104—i]	
Defendant's Exhibit "U".....	68- 69
Defendant's Exhibit "V".....	69
Defendant's Exhibit "W".....	69- 70
Defendant's Exhibit "X".....	70
Defendant's Exhibit "Y".....	71- 72
Defendant's Exhibit "Z".....	73
Defendant's Exhibit 1 .....	77- 79
Defendant's Exhibit 2 .....	79
Defendant's Exhibit 3 .....	79
Defendant's Exhibit 5 .....	82
Defendant's Exhibit 6 .....	83
Defendant's Exhibit 7 .....	84
Defendant's Exhibit 8 .....	84
Defendant's Exhibit 9 .....	84- 85
Defendant's Exhibit 10 .....	85
Defendant's Exhibit 11 .....	85
Defendant's Exhibit 12 .....	86- 87
Plaintiffs' Exhibit 11 .....	97- 99
Plaintiffs' Exhibit 12.....	99-100

130 *Edward Donlan and Ben W. Henderson vs.*

Albert Richard West:

Direct. . . . .105

Cross. . . . .108

G. H. Lowry:

Direct. . . . .109

Cross. . . . .118

Defendant's Exhibit 14 . . . . .113-115

Defendant's Exhibit 15 . . . . .115

Defendant's Exhibit 16 . . . . .116

Defendant's Exhibit 17 . . . . .117

Louis X. Juneau:

Direct. . . . .120

Cross. . . . .128

Redirect. . . . .130

Recross. . . . .130

Defendant's Exhibit 18 . . . . .122-125

Defendant's Exhibit 19 . . . . .126-127

Defendant's Exhibit 20 . . . . .127-128

Charles Carter:

Direct. . . . .130

Cross. . . . .133

Redirect. . . . .133

Recross. . . . .133

Redirect. . . . .134

Recross. . . . .134

Edward Love:

Direct. . . . .134

Cross. . . . .136

Deposition of Earl DeVeuve. . . . .137-147

Defendant's Exhibit "A" attached to said  
deposition. . . . .140-141

Defendant's Exhibit "B" attached to said deposition.....	141-143
Defendant's Exhibit "C" attached to said deposition.....	143
Defendant's Exhibit "D" attached to said deposition.....	143-144
Defendant's Exhibit "E" attached to said deposition.....	144-145
Defendant's Exhibit "F" attached to said deposition.....	145-146
Defendant's Exhibit "G" attached to said deposition.....	146
Defendant's Exhibit "H" attached to said deposition.....	146
Defendant's Exhibit "I" attached to said deposition.....	147
Defendant's Exhibit "J" attached to said deposition...	147
Deposition of Frank E. Partridge.....	147-158
Defendant's Exhibit "A" attached to said deposition.....	154-156
Defendant's Exhibit "B" attached to said deposition.....	156
Defendant's Exhibit "C" attached to said deposition.....	156-157
Defendant's Exhibit "D" attached to said deposition.....	157-158
Deposition of O. R. Daly.....	158-161
[105—ii]	
L. X. Juneau (rec.):	
Direct.....	161
Cross.....	162

132 *Edward Donlan and Ben W. Henderson vs.*

Thomas S. Dennis (rec.):

Direct.....	162
Cross.....	166
Redirect....	167
Defendant's Exhibit 21 .....	167-169
Defendant's Exhibit 22 .....	169-172
Defendants Rest.....	172
Plaintiffs' Rebuttal.....	173-217

Ben W. Henderson:

Direct.....	173
Cross.....	180
Redirect.....	182
Recross.....	182
Plaintiffs' Exhibit 13.....	176-177

Ed. Donlan:

Direct.....	183
Cross.....	192
Redirect.....	195
Defendant's Exhibit 23 .....	194
Defendant's Exhibit 24 .....	194

A. J. Violette:

Direct.....	195
Cross.....	201

Frank P. Gray:

Direct.....	202
-------------	-----

Welling Rapp:

Direct.....	202
Cross.....	204
Redirect.....	205

R. R. Hoyt:

Direct.....	205
Cross.....	206



Redirect.....	206	
Recross.....	206	
Redirect.....	206	
I. R. Keith:		
Direct.....	206	
J. P. Lansing:		
Direct.....	207	
Cross.....	209	
Redirect.....	209	
E. H. Polleys:		
Direct.....	210	
Cross....	211	
Redirect.....	211	
Recross.....	211	
W. C. Lubrecht:		
Direct.....	212	
Cross.....	213	
C. H. Richardson:		
Direct.....	214	
Cross.....	215	
Reuben Dwight:		
Direct.....	216	
R.R. Hoyt (rec.):		
Direct.....	216	
Cross.....	217	
John H. Mahoney:		
Direct.....	217	
Cross.....	217	
Testimony Closed.....		217
Submission of Statement of the Evidence..		218

In the District Court of the United States for the  
District of Montana.

Case No. 892.

EDWARD DONLAN and BEN W. HENDERSON,  
Copartners Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS AND LOWRY LUMBER  
COMPANY, a Corporation of Jackson  
County, Missouri,

Defendant.

**Statement of the Evidence.**

BE IT REMEMBERED: That the above-entitled cause came regularly on for hearing on the 7th day of June, 1912, at 10:00 o'clock A. M. of said day, at Missoula, Montana, before the Honorable GEO. M. BOURQUIN, Judge of the above-entitled court, sitting without a jury, Harry H. Parsons, Esq., and A. J. Violette, Esq., appearing for the plaintiffs, and Messrs. Hall & Pope and Rees Turpin, Esq., appearing for the defendant; whereupon, the following evidence was introduced:

**PLAINTIFF'S CASE.**

**Testimony of Ben W. Henderson, for Plaintiffs.**

BEN W. HENDERSON, one of the plaintiffs, called as a witness in their behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Ben W. Henderson, and I am a member of the firm of Donlan and Henderson. I am acquainted with Mr. Dennis and Mr. Lowry, of the firm of Turner, Dennis & Lowry. In [107—1] April, 1920, I had business dealings on behalf of my firm with this corporation; we delivered to them some lumber—two million feet in April, 1920. Plaintiffs' Exhibit 1 is the bill of sale that we gave to the defendant at that time for the two million feet of lumber.

By Mr. PARSONS.—It reads as follows:

**Plaintiffs' Exhibit No. 1.**

**BILL OF SALE.**

KNOW ALL MEN BY THESE PRESENTS: That we, Donlan & Henderson a copartnership of Pablo, Montana, the parties of the first part, for and in consideration of the sum of One Dollars, lawful money of the United States of America, to them in hand paid by TURNER, DENNIS & LOWRY COMPANY, a corporation, of Jackson County, Missouri, the party of the second part, the receipt whereof is hereby acknowledged, do by these presents grant, bargain, sell and convey unto the said

party of the second part, its successors and assigns

All the lumber now owned by us (Donlan & Henderson) in pile at our sawmill lumber yard at Fletcher Spur, near Pablo, Flathead County, Montana, containing approximately Two Million (2,000,000) board feet.

This bill of sale is given, however, subject to our vendors' lien upon all of said lumber, for balance due thereon from said parties of the second part to the parties of the first part, according to a certain contract of sale, entered into between said parties on this 16th day of April, 1920.

TO HAVE AND TO HOLD the Same, to the said parties of the second part, its successors and assigns forever; subject, however of the vendors' lien before mentioned, and we do for our heirs, executors and administrators, covenant and agree to and with the said parties of the second part its successors and [108—2] assigns, to warrant and defend the sale of the said property, goods and chattels hereby made, unto the said parties of the second part, its successors and assigns, against all and every person whomsoever, lawfully claiming or to claim the same.

IN WITNESS WHEREOF we have hereunto set our hand and seal the 16th day of April in the year of our Lord one thousand nine hundred and twenty.

DONLAN & HENDERSON. (Seal)

By E. DONLAN. (Seal)

E. DONLAN. (Seal)

BEN W. HENDERSON. (Seal)

(Testimony of Ben W. Henderson.)

Signed, sealed and delivered in the presence of:

A. J. VIOLETTE.

By the WITNESS.—Thereafter we delivered the lumber described in the bill of sale to the defendant herein. Plaintiffs' Exhibit 2 is the original bill of sale made by Mr. Donlan in behalf of the firm and delivered by the plaintiffs to the defendant.

Plaintiffs' Exhibit 2, then read to the Court by Mr. Parsons, conveys from Donlan & Henderson, for a consideration of \$8,917.76, to Turner, Dennis & Lowry Company, 891,776 feet of lumber in yard at Fletcher Spur, Flathead County, Montana, and is dated June 28th, 1920.

By the WITNESS.—Thereafter we as a firm and on behalf of the plaintiffs delivered to the defendants and gave them a bill of sale for other lumber Plaintiffs' Exhibit 3 is the bill of sale evidencing the delivery of the lumber and correctly stating the amount delivered to defendant.

Plaintiffs' Exhibit 3, then read to the Court by Mr. Parsons, conveys from Donlan and Henderson, for a consideration of \$4,466.36, to Turner, Dennis & Lowry Lbr. Co.

446,636 ft. @ \$20.00 /M.....	\$8,932.72
Less \$10.00 /M. ....	4,466.36

---

\$4,466.36

[109—3] now being in the County of Flathead, State of Montana, the date of the bill of sale being left blank.



(Testimony of Ben W. Henderson.)

By the WITNESS.—We delivered and gave a bill of sale for other lumber Exhibit 4 is the bill of sale and property expresses the quantity of lumber delivered at that time.

Plaintiffs' Exhibit 4, then read to the Court by Mr. Parsons, conveys from Donlan and Henderson, for a consideration of \$10,289.98, to Turner, Dennis & Lowry Lumber Co., 514,499 feet of lumber @ \$20.00 per M., and is dated the 2d day of September, 1920.

By the WITNESS.—We had an agreement or contract with these gentlemen under which we delivered and sold this lumber; Plaintiffs' Exhibit 5, is the contract under which this delivery and sale was made.

Thereupon, over the objection of the defendant, Plaintiffs' Exhibits 1, 2, 3, 4 and 5 were admitted in evidence, as was also Defendant's Exhibit "A."

Plaintiffs' Exhibit 5, so admitted in evidence, is the contract a copy of which is attached to both the complaint and the amended answer as exhibits.

By the WITNESS.—We had delivered to the defendant, up to and including the 3d day of August 1920, 2,338,412 feet of lumber. That was the total that was consumed by fire. The figures are [110—4] 3,338,412 feet; there was two million in what we called the old yard and there was 1,338,412 feet in the new yard. That was the total amount conveyed by these bills of sale. To effect a delivery of that lumber to the defendant we cut and piled, as instructed by them, and siezed, and had ready to ship, awaiting their orders. It was piled

(Testimony of Ben W. Henderson.)

in the yard as designated in the contract; it was stenciled with their name as fast as the bill of sale was given; the total amount that was burned was stenciled with their name at that time. The defendant had an agent on the ground representing it in these transactions; he was Mr. L. X. Juneau. Mr. Juneau came to our mill once a month and inspected our work and made suggestions as to what we should cut and how it should be piled, and checked the yard, and all checks signed—we delivered to him a bill of sale and he signed the drafts which we collected through our bank. He was present at the time that this lumber had been turned over to them through these bills of sale on the 3d day of August, 1920. That was the date of the fire.

After we had entered into this contract on the 16th day of April, 1920, to effect a delivery of that 2,000,000 feet of lumber expressed in Exhibit 1, we shipped as fast as we received orders. A bill of sale was given and the lumber stenciled. It was in our contract to stencil the lumber at that time; they brought the stencil to us and the next day after this bill of sale was given Mr. Juneau and Mr. Dennis brought the stencil, paint and brush and asked us to do this at once; that was done on the 2,000,000 feet. Outside of the 2,000,000 feet, the rest was sawed by us under the contract.

As to the value of the 3,338,412 feet—the market price of it, in the first week in August, 1920, we have a record of the lumber which burned there

(Testimony of Ben W. Henderson.)

which we made out in order to [111—5] settle with the insurance companies. The price we reached there was reached by Mr. Juneau and I, Mr. Juneau representing the defendant at that time.

“I will say this in explanation, that on August 3d, Mr. Juneau was there at the fire, and then he went away, and he came back in the evening—I don’t know whether he got to Polson or not when he saw the fire coming, he left there just before dinner time I know, that day, and he came back, I think it was possibly the next day after the fire, the fourth, I think, of August, that he came down, and we told him we had to extend the prices on this lumber. We had to do this to settle with the Insurance Companies, that is why that was made at this time, and we asked him to come down and give us these prices that we figured out the value of that lumber, to hand the adjuster, and Mr. Juneau came down and gave the prices, and those figures I have extended.

Q. Well, what were the average prices per thousand that you and Mr. Juneau agreed on by the extension of the figures?

By Mr. POPE.—Objected to, as no foundation is laid to show the authority of Mr. Juneau to bind us by his admissions, if this is offered in the nature of admissions on our part.

By the COURT.—If it is not hereafter shown,—counsel cannot put in all his case at once,—if it is not hereafter shown to the extent that it is neces-

(Testimony of Ben W. Henderson.)

sary the evidence will be disregarded by the Court; at this time the objection is overruled.

Exception.

A. \$51.75 per thousand, average."

That was the f. o. b. price. The expense of putting the lumber from the pile at the planer on to the cars was \$2.50 a thousand; that would be substantially \$48 a thousand in the pile. The lumber was all in pile at the time it was burned. I haven't with me the total value that would be. Asked to tell the difference between the highest market price and the market price of lumber, I will say the highest market price obtainable at that time, in my judgment, would be five to seven thousand above that average. The market price is the list upon which lumber was at a certain time sold by the manufacturers; there is often quite a difference in the market value and the highest market value because of the condition of the lumber market at a specified time; at that specified time there was such a demand that a man could offer, and a great many men did secure better prices than those. Those were the prices taken from the price lists which were the regular market value at that time; then lumber sold at that time at very much higher values.

There was paid to us by these people on this 3,338,412 feet of lumber that was burned, \$20 per thousand; that was all that was ever paid on that by them to us. This lumber was insured under our contract. We had \$70,000 insurance which we

(Testimony of Ben W. Henderson.)

placed with the old line companies the time we purchased the lumber; and then we had the \$60,000 placed with the Inter-Insurance Exchange, of Seattle, Washington; that we placed later and put it on as our yard filled up. In the first place we bought 2,000,000 feet of lumber from W. H. Smead, and [112—6] when we made the purchase we insured it for \$70,000, the price we paid for the lumber. That was on the 15th day of April, 1920. That insurance policy is in the bank; I surrendered it when I made our proof of loss. There was \$20 per thousand feet made payable to Turner, Dennis and Lowry, as their interest might appear, and as our interest might appear. The rest was made payable to us as our interest might appear. This second policy for \$60,000 was taken out at intervals as the lumber increased in the yard when it was sawed. Our bookkeeper always ordered this insurance by telephone. The order was given to Mr. DeVeuve, at Seattle, Washington, telephoned or wired by our bookkeeper. There was no provision made in that policy as to payment of insurance; it was payable to Donlan and Henderson. That was absolutely unintentionally inserted in there; it never occurred to me that they were not named in it until we went to make the proof; that was an oversight.

Cross-examination by Mr. HALL.

The lumber was in pile at Fletcher Spur, Flat-head County, and right at our mill. Mr. Dennis was there and inspected the lumber; that was after



(Testimony of Ben W. Henderson.)

this contract had been signed. They paid us \$20 a thousand on it; as to whether that was an advance, I will say it was the first payment. Then we were to stencil the lumber in their name and to load it and ship it according to their instructions. When we got orders we were to plane whatever we got orders to plane. We were to plane it, load it on the car and ship it according to their orders.

We shipped them some lumber; when we made those shipments we invoiced the car, the first car that was loaded we drew on them for the amount, estimated the feet, and drew on [113—7] them for the amount, and according to our contract, and they asked us later not to do that thing, and after the first or possible the first two cars, we didn't do that. Defendant's Exhibit "B" is the invoice that accompanied the car of lumber specified therein; it was attached to a draft. That is an itemized statement of the amount of lumber in the car together with the bill for the amount. We have here "Less 15% commission," and I will explain that. The first car there, our bookkeeper was not familiar with that way of doing business and not having any counsel he deducted 15% from the whole amount, and sent that in, and Turner, Dennis & Lowry were kind enough to correct him in that; of course, that was a mistake of Mr. Ramsey. They were to have the 15% for selling; each one of them was marked, "Less 15% Commission." As a matter of fact, that is what Turner, Dennis & Lowry

(Testimony of Ben W. Henderson.)

got out of the deal, 15% commission, whatever they would sell the lumber for.

As to whether I knew what they would be able to get for this carload of lumber, the first carload of lumber, if I remember right, we had the price on that. Now, they were unable to get us very many cars, it seems, but after they finally began to give us orders—I think the first two cars of regular shipments were also put on that kind, and generally they would put up a load of orders that were transit orders, that were not desirable, but we loaded first on transit orders, which were handled in this way: they would telegraph us to ship a carload to Alliance, Nebraska; we would ship it; then they would divert it to a customer they found while the carload was enroute, collect the amount, retain the \$20 per thousand they had advanced us, retain their 15% commission, and we would get the balance. They were all handled the same way. All the lumber that was shipped by us, they were supposed to find the [114—8] purchaser, take out the \$20 a thousand and the 15%, and deliver to us the balance, less the freight.

Defendant's Exhibit "B," now admitted in evidence without objection, is an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated June 29, 1920, for 21048 feet, \$1264.66, less 15% commission, \$189.69, net \$1074.97; marked "Sold Skerritt Lbr. Co." and "Less 15% of Selling Price."

Also an invoice from Donlan & Henderson to

Turner, Dennis & Lowry Lbr. Co. dated July 1, 1920, for 28,844 feet, \$1471.04, less 15% commission \$220.65, net \$1250.39; marked "Sold to Monongahela Lbr. Co., Elwood City, Pa."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 10, 1920, for 25597 feet, \$1503.82, less 15% commission \$225.57, net \$1278.25; marked "Sold to Everett O. Blanvelt."

Also an invoice from Donlan & Henderson to Turner, Dennis & Yowry Lbr. Co., dated July 10, 1920, for 26,269 feet, \$1665.41, marked "Sold on consignment basis. Less 15% commission. Sold W. Y. Taylor Rutledge, Mo."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 10, 1920, for 28,510 feet, marked "Sold on consignment basis Less 15% commission."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 12, 1920, for 36937 feet, \$2114.56 marked "Sold on consignment basis of 15% commission."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 12, 1920, for 34,272 feet, \$1985.56, marked "Sold on consignment basis Less 15% commission." [115—9]

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated July 30, 1920, for 27699 feet, \$1218.76, marked "Less 15% commission," and "John Morrell & Co."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated Aug. 6,

1920, for 27,200 feet \$1687.57, marked in pencil "Less 15% Com." and marked "Traverse City Casket Co."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated Aug. 3, 1920, for 27,659 feet, \$1217.00, marked in pencil "Less 15% Com."

Also an invoice from Donlan & Henderson to Turner, Dennis & Lowry Lbr. Co., dated Aug. 12, 1920, for 33701 feet, with pencil notation on attached slip "Shipped on consignment. Not yet sold. In storage at East St. Louis. 1/21/21." And sheet No. 2 of the same for 39345 feet.

By the WITNESS.—Defendant's Exhibit "C" is the letter in which, as I say, Turner, Dennis & Lowry kindly corrected the mistake of the book-keeper in regard to our method of doing business.

Defendant's Exhibit "C," then admitted in evidence without objection, is on the letter-head of Turner, Dennis & Lowry Lumber Co., and reads as follows:

**Defendant's Exhibit "C."**

July 6, 1920.

Donlan & Henderson,

Pablo, Montana.

Gentlemen:—

We have your three invoices of June 29th and July 1st and [116—10] are glad indeed to note that you are getting action on these orders.

We are very anxious to get everything out just as quickly as possible so that we can take advan-

tage of what cars can be obtained at this time. We wrote you to this effect just a day or two ago and sent you loading schedules in which you could load any cars that were furnished you.

We note in your letter in regard to furnishing filler for orders calling for small cars. Beg to advise that it will be agreeable on any order which we send you to increase or decrease the items proportionately to fit the equipment that is furnished you. Of course try to secure a car which will fit the order but if this is not possible you may, as above stated, either increase or decrease proportionately but do not increase all of one item at the expense of others or decrease all of one item without decreasing the other items proportionately.

We note that you have credited us with 15% of the delivery price. Our contract anticipated 15% of the f. o. b. mill net price so you are giving us credit for more than we have coming on those shipments. We are figuring the estimated weight on these invoices and charging you with 15% of the amount of your invoice less the estimated freight. This is only a memorandum charge and as soon as the freight bills come in, the 15% charge will be corrected either higher or lower depending upon whether the actual freight overruns or underruns the estimated freight.

We judge that this is an oversight on your part and thought best to explain this to you before



(Testimony of Ben W. Henderson.)

other shipments had come forward.

Yours very truly,

TURNER, DENNIS & LOWRY LUMBER CO.

THOS. S. DENNIS. [117—11]

By the WITNESS.—That was a correction made thereafter, and it wouldn't matter what price Turner, Dennis & Lowry sold the lumber for, they remitted to us the purchase price, less the cost of freight set forth, less their \$20 a thousand they had advanced, and less the 15% commission which they got for selling. When they accounted to us and made these returns, for each car they would send a statement after the form of Defendant's Exhibit "D."

Defendant's Exhibit "D," then admitted in evidence without objection, is upon the letter or form head of the defendant, is dated Nov. 27th, 1920, and reads as follows:

**Defendant's Exhibit "D."**

Donlan & Henderson,

Pablo, Montana.

Gentlemen:

Herewith please find final settlement:

On Car PRR. No. 87426 Your invoice..\$1,264.68

On Account:

Check \$359.15

Disc. \$ 7.33

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\$366.48 Total advance payment..\$ 366.48

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Balance...\$ 898.18

(Testimony of Ben W. Henderson.)

Final Settlement:

Freight 34,906 lbs. 77.....\$ 338.94

Excess freight charges per

Form No. 2.....

War tax.....

Demurrage....

Reconsignment... ..

[118—12]

Change of consignee.....

15% commission..... \$ 138.93

Credit their account \$20.00

Per M on 21,048 ft.....\$ 420.96

Discount.. ..\$ 8.41

Checks enclosed..... \$ 8.41

Overpaid.. .. \$ 8.61

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\$ 906.79 \$ 906.79

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Yours truly,

TURNER, DENNIS & LOWRY LUMBER CO.

The hour of noon having arrived, the Court suspended until 1:30 o'clock P. M., at which time the trial and the cross-examination of the witness Ben W. Henderson was resumed.

By the WITNESS.—When we had cut some more lumber after the last bill of sale was given Mr. Juneau would come and invoice it, and then we would give him a bill of sale and he would give us a draft for \$20 a thousand; that would be the \$20 a thousand that was agreed between Dennis and us

(Testimony of Ben W. Henderson.)

that they were to give us; that was done once a month between the first and the tenth, and the name of Turner, Dennis & Lowry was put on in stencil on the piles. Then when we got the order from Turner, Dennis & Lowry we put this lumber through the planer and loaded it on the cars and shipped it to their order, and they held out \$20 a thousand that they had advanced us or paid us, held out their 15% commission and remitted the balance to us; that was the way we were doing business up to the time of the fire.

We got two million feet we bought from Smead; that Smead cut compared with the lumber we cut before June 28th, in quality, about on an average—near somewhere the same quality of logs; the million and a half that we cut was about the same [119—13] quality as the two million we bought from Smead. We paid Smead \$35 a thousand for that lumber. We had \$130,000 total insurance at the time of the fire; \$70,000 of that was in the old line companies; I couldn't recall their names; the Palatine was one—it was all written with Schlick & Gage—and the Firemen's Fund was one and the British Company. These policies ran to Donlan & Henderson and to Turner, Dennis & Lowry as their interest might appear. The \$60,000 in the Inter-Allied Insurance people, in Seattle, Washington, ran straight to Donlan & Henderson.

Defendant's Exhibit "E" is a statement of account made by our Mr. Rapp and Mr. Keith for Turner, Dennis & Lowry, and I believe delivered to

(Testimony of Ben W. Henderson.)

Mr. Lowry. I take it that showed the state of our account at the time that was made, as our books showed it; I don't do that part of the work myself and you will have to get that information from Mr. Keith if you want any detailed information about it.

(By Mr. PARSONS.)

Q. Was this instrument, Defendant's Exhibit "E," a compromise offer on your part, after the controversy arising in this case?

A. That was issued to Mr. Lowry at a time when Mr. Lowry was here, and trying to make a compromise rather than go to court; that was a compromise proposition.

Cross-examination (Resumed).

By the WITNESS.—Mr. Lowry and ourselves were endeavoring to adjust our differences and settle up and our bookkeeper rendered this as a statement of the account that, I presume, our books showed at that time. That is Mr. Ernie Keith's writing; he is our head bookkeeper. When this statement was made and we were trying to come to some understanding that was written for the basis of settlement. I was there when this was handed to Mr. [120—14] Lowry. I knew what was written on the bottom here in regard to any corrections; I am familiar with it.

Defendant's Exhibit "E," then admitted in evidence over objection, is in words and figures as follows:

Turner, Dennis and Lawry Co.

**Defendant's Exhibit "E."**

Turner, Dennis and Lowry Co.

IN ACCOUNT WITH DONLAN &amp; HENDERSON.

11/23/20

1920

Debits      Credits

Note dated 4/15/20 due 7/16/20

7% ..... 10,000.00

Note dated 4/15/20 due 8/16/20

7% ..... 10,000.00

Cash 4/15/20 ..... 40,000.00

Note dated 6/28/20 due 9/1/20

8% ..... 6,082.24

Note dated 6/28/20 due 10/1/20

8% ..... 5,000.00

Cash 6/28 ..... 17,835.52

Cash 6/28 to apply on notes.... 8,917.76

Cash 8/4 ..... 8,932.72

Cash 8/4 to apply on notes..... 4,466.36

Jan. 29. Car 87426 Penn. our order #1

21038 ft. @ 20.00 apply on ad-  
vance ..... 420.76

July 1. Car 75494 N. H. our order No. 2

28844 ft. @ 20.00 apply on ad-  
vance ..... 576.88

July 1. Car 37558 B. &amp; O. our order #3

25597 ft. 20.00 apply on ad-  
vance ..... 511.94

July 9. Car 38703 I. C. our order #4

26269 ft.....1665.41

Less frt. 47000# 57¢..... 267.90

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1397.51

Less 15% ..... 209.63      1,187.88

July 10. Car 40368 B. &amp; M. our order #5

28510 ft.....1630.53

Less frt. 52100# 57¢..... 296.97

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1333.56

Less 15% ..... 200.03      1,133.53

July 12. Car 155093 R. I. our order #7

36937 ft.....2114.58

Less frt. 61300# 74¢..... 453.62

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1660.96

Less 15% ..... 249.14      1,411.82



*Turner, Dennis & Lowry Lumber Co.*      153

1920		Debits	Credits
July 12.	Car 56461 N. Y. C. our order #6		
	34272 ft.....	1985.56	
	Less frt. 59200# 75.....	444.00	
	.....	1541.56	
	Less 15% .....	231.23	1,310.33
July 30.	Car 130074 Soo. our order #8		
	27699 ft.....	1218.76	
	Less frt. 53100# 57.....	302.67	
	.....	916.09	
	Less 15% .....	137.41	778.68
[121—15]			
Aug. 1.	Car 61665 N. & W. our order #9		
	27200 ft.....	1687.57	
	Less frt.....	309.00	
	.....	1378.57	
	Less 15% .....	206.79	1,171.78
	Totals .....	21,887.72	97,850.48
1920	Totals .....	21,887.72	97,850.48
Aug. 2.	Car 558814 Penn. 27659 ft.....	1217.00	
	Less frt. 53760# 57.....	306.43	
	.....	910.57	
	Less 15% .....	136.59	773.98
	Discount on dfts. 4/15.....	177.80	
	Cash 10/4 .....	60,000.00	
	699972 ft. Nov. finished piles		
	20.00 .....	13,999.44	
	.....	96,838.94	97,850.48
	.....		1,011.54

This statement was made in a hurry and we cannot guarantee that it is absolutely correct, but we believe that it is approximately so. Any error therein may be easily corrected. The statement does not include the computation of interest on advancements or loans made by Turner Dennis Lowry Lumber Co., nor on the repayments or credits of

(Testimony of Ben W. Henderson.)

Donlan & Henderson. This computation can easily be made at any time. And it does not include any adjustment for car #78,564 U. P. our order #11, Aug. 6, 1920, nor the expense bills of any shipments heretofore made. We also call your attention that all notes held by you against us have been paid and we ask that you return same to us promptly.

By the WITNESS.—The first of the insurance money was collected, I think, on September 29th, or thereabouts; the other was some time in the latter part of October; we collected seventy thousand on September 29th; that was from San Francisco. There was sixty thousand we collected later and I think that was all paid in October; I wouldn't be positive as to the date; it is possible that it was paid on October 26th and that the final draft was [122—16] issued from Seattle. That is my signature on the proof of loss attached to the deposition of Earl DeVeuve, made to the Inter Insurance Exchange of Seattle; that is my partner Mr. Donlan; I recognize the signatures all right; no doubt that is correct. Those are the signatures of Mr. Donlan and myself on the Articles of Subrogation attached to the deposition of Earl DeVeuve. They were signed by us and sent to the insurance company at the time this sixty thousand dollars was paid us; there are two of them. I have before seen the letter marked Defendant's Exhibit "F," and that is my signature.

Defendant's Exhibit "F," then admitted in evidence over objection, and one paragraph of which was then read, is as follows:

**Defendant's Exhibit "F."**

(Letter-head of DONLAN & HENDERSON.)

Pablo, Montana, August 30, 1920.

Mr. Thos. S. Dennis,

c/o Turner, Dennis & Lowry Lumber Co.,

New York Life Bldg.,

Kansas City, Mo.

Friend Mr. Dennis:

Yours of the 23d inst. received and in response will say that I regret very much to learn that you have not been well, but glad to know that you have recovered and shall look forward with much pleasure to the time when you will visit us, and hope that your plans are to bring Mrs. Dennis with you.

We built a shack in the camp and my wife and children have proven themselves pioneers; they enjoy the change.

Would have written you long ago, but from the fact that Mr. Juneau was here at the fire, I had presumed that you had received a detailed report. The fire was at first noticed at 12:45 P. M. on August 3d in a pile of 1x6 about one hundred feet [123—17] from the railroad track and about three hundred feet from the mill; the pile in which the fire started was about forty courses high; there was a high pile on one side, the other three sides being vacant, therefore it was a very favorable place to fight it. There was two barrels of water within one hundred feet, we had a wagon tank of water there within ten minutes, also hose from the pump at the mill. I drove to Pablo and got three fire

(Testimony of Ben W. Henderson.)

extinguishers and with these efforts and plenty of willing men, we held it in that pile for an hour before it reached another pile. Then all that we could do was to turn our attention to the mill and woods. We saved the mill and got the woods fire under control after it had burned through about a million feet of logs. We think that we will have seventy-five per cent of salvage in these.

We had no insurance on logs, had \$130,000 on lumber. Our figures show that we were \$35,000 underinsured on lumber. The adjusters made no protests. We have filed our proofs of loss and should be getting some money soon. There can be no question about the origin of the fire in my judgment. A spark from a locomotive which passed here at 11:30 set the fire.

We lost but two days with the mill, have a nice little start made towards another yard. Labor is scarce but have been able to keep going so far; this is the threshing season and I think that we will have plenty of help within the next two or three weeks.

With kind regards from myself and Mrs. Henderson to yourself and Mrs. Dennis, I am

Yours respectfully,

BEN W. HENDERSON.

By the WITNESS.—As well as I remember there was about five hundred thousand [124—18] feet of lumber in the yard that was destroyed by fire that you have not advanced \$20 a thousand on. How long it would have taken us to have worked

(Testimony of Ben W. Henderson.)

that lumber out and loaded it on the cars and shipped it out would entirely depend on how urgent the necessity was, and we could have loaded it very quickly if conditions had warranted; if we had the order to do it and they asked us to do it quickly we could have done it. The capacity of our planer at that time for one shift was thirty-five to forty thousand; of course if it had been necessary we could have put on two shifts and doubled it.

Redirect Examination by Mr. PARSONS.

When I used the word "we" in Defendant's Exhibit "E," when I say "we were underinsured" and "we didn't have any," I referred to Donlan & Henderson. The capacity of our planer, double shift, was about seventy-five or eighty thousand. You load from twenty-five to thirty-five thousand in a car. I would say there was a million feet of this lumber ready for shipment May first; by June first there would have been another million; and by July first the remainder. We didn't ship this lumber out before the four or five cars between August 3d and August 16th because we had no orders to ship any faster than we shipped. The condition of the market was good and in fact it was a runaway market. I have been in business twenty-five years. I think ten days to two weeks would be the time required for a lumber salesman to sell that lumber at any period from May first to August 3d. This \$35 a thousand which we paid for it was about seventeen or eighteen dollars under the actual market value



(Testimony of Ben W. Henderson.)

of lumber at the time we bought it; we expected to make a profit when we bought it. Adverting to the claim in the complaint of \$13,999, after the fire we sold to the defendant [125—19] other lumber and gave them bills of sale therefor. Plaintiffs' Exhibit 6 is the bill of sale we gave them for the lumber, and the amount therein stated is accurate.

Plaintiffs' Exhibit 6, then admitted in evidence without objection, is a bill of sale from Donlan & Henderson, conveying to Turner, Dennis & Lowry Lumber Company, for a consideration of \$13,999.44, 699,972 feet at \$20 per M, said lumber being in Flathead County, Montana.

By the WITNESS.—They did not pay us for that; their draft was turned down. We received from them this letter of the defendant, dated November 17th, 1920.

Plaintiffs' Exhibit 7, then admitted in evidence without objection, is a letter on the letter-head of the defendant company, addressed to Donlan & Henderson, Pablo, Montana, and reading as follows:

**Plaintiffs' Exhibit No. 7.**

Gentlemen:

We have your letter of November 6th, confirming your wire of the same date, with reference to the insurance money.

Since receiving this we have exchanged several wires with Mr. Juneau, and it is, of course, needless to go into details in regard to these.

We regret that it has been necessary for us to be so insistent in regard to the recovery of this money, but as we have explained to you previously, and several times through Mr. Juneau, we obligated ourselves to take up a note at the bank in the amount of \$25,000 anticipating that we would have all of the insurance money in our possession by that time.

When the money did not arrive and we had insistent assurances from the Insurance Company that the \$20,000 of the money [126—20] had been sent to you, we kept holding the bank off from day to day expecting every day that the money would be forthcoming in the next mail. You can readily imagine the embarrassment and the serious situation in which we found ourselves when we learned that the money had been received by you and given for your own needs.

Of course, the writer appreciates just exactly how urgent were your own requirements having gone through this matter with you before, but this is one place where we believe that our claim was entitled to prior consideration. We were entitled legally to the first returns from the insurance money until our claims were liquidated, but in spite of this we permitted you to use \$20,000 of the first receipts from the Old Line Companies and the Inter-Insurance Exchange, knowing that it was necessary for you to have some funds to resume operations after the fire, and to cover the time before we could make our next advance. However,

we have made all of our advances very promptly to you, and on two or three occasions when it has been necessary for you to have additional funds we have gone deep down into our pockets and advanced you some that was not justified by the contract nor the market conditions.

It was very embarrassing for us to have turn down Mr. Juneau's draft for your November advance, but as we advised Mr. Juneau in our wire it was absolutely impossible for us to take this up without making some adjustment of the amount which we had promised the bank.

We thought if you would permit us to deposit sight draft against you for the \$20,000 that this would enable us to straighten matters up with the bank, and we could then go ahead and arrange for our finances on the \$14,000 draft, but when you failed to wire us authority to make the deposit of the sight [127—21] draft you left us high and dry again.

We are now waiting for some definite advice from Mr. Juneau before we can proceed. Of course, we will take up this draft just as soon as we can get these matters straightened out, and we can only trust that you will appreciate the situation with us and not misunderstand the holding which made it necessary for us to return this draft.

Mr. Juneau advises us that you are hurt, and disappointed because we have not sent you the notes which you gave us for money which we had advanced to you; furthermore that you were hurt at

our attitude in regard to the subject to our holding the insurance policies.

With reference to the notes, we cannot understand why you should take exception to our holding these notes, when they have not been paid. You owe us some \$36,000 plus up to the 1st of October which amount is still past due, and the notes which we hold from you do not total this amount. It is true that you paid us \$60,000 of insurance money, but your total indebtedness to us was somewhere in excess of \$95,000, and we can see no reason why you should take exception to our holding these notes when the amounts have not been paid. You may rest assured that just as soon as the balance due on the adjustment which the writer made with Mr. Henderson when in Pablo last month, has been taken up, that these notes will be returned to you.

With reference to the insurance, the writer took the precaution of going into this matter most fully with both Mr. Donlan and Mr. Henderson, when he was in Montana last month, and at that time we all seemed to be in perfect accord. We do not know of any commercial activity where insurance is carried on property, or possession that are mortgaged, or against which an assignment has been made, but what the insurance policies are [128—22] held by the parties holding the mortgage, or in whose favor the assignment is made. If you will try to borrow money on a house, you will invariably be required to insure the house for certain sums in favor of the parties lending you the money, and they will invariably insist upon

your putting up the policies. There is no reflection upon your integrity or good intentions in this, but simply a cold-blooded business proposition. We are advancing certain sums of money to you, which are supposed to be protected by insurance in our favor, and we would be very poor business men indeed, if we did not insist upon having conclusive evidence of proof in our possession that our interests were protected.

The trouble that we are now having adjusting this old insurance matter should be sufficient evidence of the errors and mistakes which can creep in, as had these insurance policies been in our possession we would have immediately discovered that there was no loss payable clause in our favor inserted in these policies, and we would, of course, have insisted upon having this corrected. Aside from this, we are carrying large sums of money as advances on lumber stocks, and are able to obtain financial assistance from the bank on the assumption that these advances are fully protected by insurance. Where we cannot display policies to them properly covering our interests it naturally weakens our position with them from a borrowing standpoint.

On practically every operation that we are interested in, such as yours, we insist. not only in carrying the insurance policies in our possession, but on placing the insurance as well, not being willing to leave this to the manufacturer, as he is too busy, as a rule, with other details to give serious thought to the matter of insurance. In your case we made an exception, knowing that Senator Don-



Ian had a good many friends [129—23] in the insurance business that he would like to favor, and only reserving the privilege of retaining these policies in our possession.

We have previously stated that we do not wish to be unreasonable nor arbitrary about this matter, but we do think that we are entirely within our rights, and are asking nothing unreasonable from you, and we insist that you let us retain these policies.

I have urged Mr. Lowry to go into this matter with you fully when he calls on you, as we want you to know that there is nothing personal about this, but simply a desire on our part to make this transaction as nearly one hundred per cent perfect business arrangement as can be affected.

We feel that we can be of a great deal of service and benefit to you, and that you can likewise serve us in an equal capacity, but we must have a frank and complete understanding about matters of this nature, as we will never get any place if we are constantly irritated with one another. and fighting at cross purposes.

Will you please take the time to give this matter serious consideration, and then sit down and write us a letter with all hurts and feelings of injustice eliminated, and let us see if we cannot get together on this matter of insurance without personalities creeping in?

We are very much in hopes that by the time this letter reaches you that you will have arranged to take care of the \$20,000 item, and also that you will

(Testimony of Ben W. Henderson.)

be in position to favor us with settlement on the balance of the money due us, under our agreement and settlement made last week.

Awaiting further advice, and with personal regards to you all from the writer, we beg to remain, [130—24]

Yours very truly,

TURNER, DENNIS & LOWRY LUMBER  
CO.

By the WITNESS.—This was an advertence to the same \$13,999, plus, that we have just been talking of.

By Mr. PARSONS.—In that connection, I wish to introduce in evidence the last clause in paragraph 8, of defendant's fourth counterclaim, which reads as follows, "But that said sum has not been paid nor any part thereof, save and except the sum of \$60,000 paid to the defendant by the plaintiffs on the 2d day of October, 1920, and there still remains due and owing to the defendant from the plaintiffs on account of the money collected from insurance upon said lumber as aforesaid, the sum of \$15,398.45, together with interest thereon at the rate of eight per cent per annum from the 1st day of November, 1920, less the sum of \$13,999.44 credited to plaintiffs by the defendant as hereinafter alleged.

By the WITNESS.—Instead of paying us this money they claim to have credited it on our account.

By Mr. PARSONS.—And to the same effect, I wish to introduce, if your Honor please, the last clause in paragraph 9 of the same count, count num-

(Testimony of Ben W. Henderson.)

ber 4, of their counterclaim, which reads as follows: "the sum of \$13,999.44 was loaned on the 8th day of November, 1920. on 699972 feet of lumber by defendant's then crediting to the plaintiffs that [131—25] sum of money as a payment upon the said sum of \$15,398.45 then due the defendant from the plaintiffs."

Recross-examination by Mr. HALL.

As to whether we had trouble getting cars, when we first put in an order for cars we experienced a little trouble because of the embargo that was on cars at that time, and we first had to ascertain what cars could be loaded for those points, and after we got that adjusted, after the first two days, and what the intention of the order, we had no difficulty in getting cars. I recognize the signature upon Defendant's Exhibits "G," "H" and "I" as that of Mr. Rapp, who was our bookkeeper. These are all in relation to shipping orders.

I don't know how long we were delayed on account of the blower, but it seems to me a week or ten days; we had some trouble in getting parts for that boiler at that time, in fact, it was ordered, and we didn't shut down for a few days, the stuff was all there. and then when it come, they lost the separator, and couldn't locate it on the railroad, and had to make another one, and it seemed to me a long time—I think a week or ten days. This letter of July 2d contains instructions about when we ship the car, we ship and then tell them where we ship it,

so that they would divert it to the customer when they found one.

Defendant's Exhibit "G," then admitted in evidence over objection, is from the defendants to the plaintiff, dated June 22, 1920, and reads as follows:

**Defendant's Exhibit "G."**

We are in receipt of your orders: Your Nos. 616-B, 616-D and 618-A for which we thank you very much. [132—26]

We will give these orders our immediate attention, but are having trouble getting cars at the start; however we will advise you, should anything handicap us altogether. The embargo in some parts of the East seems to still be in force.

Defendant's Exhibit "H," then admitted in evidence over objection, is a letter from Turner, Dennis & Lowry Lumber Co. to Donlan & Henderson, dated July 2, 1920, and reads as follows:

**Defendant's Exhibit "H."**

Gentlemen:

We have your favor of June 22d, acknowledging our order numbers 616-B, 616-D and 618-A. We note that you give these orders your immediate attention, but are having trouble in getting cars. This is a subject which we wish to take up with you, as we believe that the whole lumber situation during the next four or five months will hinge upon the car situation. Cars are already tight everywhere, and will undoubtedly get even more tight later on. If there is any pressure that you can bring to bear

that will enable you to secure cars, believe that you certainly ought to do so, as it is going to be very difficult, even at the best to get all of the stock shipped, within the next six months that can be marketed.

We are enclosing a memorandum of standard loading covered by items #1 to 11, and would suggest that you put this on file in your shipping department and whenever you are able to secure a car of any kind, and have no other orders from us on which to load, load one of these assortments, which ever one of these assortments suits your stock to best advantage. As soon as you start loading one of these assortments, wire us at our expense, giving us car number, and advising what item number you are loading, and we will wire you destination. We believe that this [133—27] will enable us to take advantage of all possible equipment which we can secure and is the only way we can get by with the car situation as it will likely be the next several months.

It is imperative that you wire us when you start loading one of these assortments, so we can instruct you where to ship it, and trust that you will not fail to do this. We have tried to make up standard assortments which would fit your stock and will take care of any others items which accumulate by special orders from time to time. We would like to have all dimension dressed 4 sides if it is possible for you to work it in that manner, but if necessary the Dimension may be dressed side and edge. Do not mix the two different workings in any shipment,



in other words, all the dimension in any one car must be either side and edge or four sides.

You will note that we have given you permission to load either White Pine or Fir and Larch on both of these assortments. In loading this, however, be sure to load only one character of wood in the car, in other words, if you are loading White Pine, boards, all of the 1" common must be White Pine, as if you mix White Pine and Fir & Larch, it would kill the advantage which we would gain in selling the White Pine at a higher price. This only applies to the common, as it is alright to mix White Pine Common with Fir & Larch uppers.

We are going to need your co-operation in the way of getting cars to enable us to get all of this stock marketed while the price is attractive, and trust you will do everything within your power to secure an amply supply of equipment.

Defendant's Exhibit "I," then introduced in evidence over objection, is a letter from Donlan & Henderson to Turner, Dennis & Lowry Lumber Co., dated [134—28] July 24th, 1920, and reading as follows:

**Defendant's Exhibit "I."**

Gentlemen:

We are in receipt of your letter of the 20th inst. asking for acknowledgment of your order No. 701-J of July 8th.

This order was evidently somewhat delayed in the mails as we received it on the 16th and acknowledged receipt on the 17th together with four invoices enclosed your orders Nos. T-701-L, T-701-N,

(Testimony of Ben W. Henderson.)

T-701-M and T-701-K. Kindly advise whether or not you have received these.

We also called your attention to the fact that we would be shut down for a few days to install a blower, and as a matter of fact have been shut down longer than we expected because of a delay in receiving some blower parts. However we plan on starting to plane again Tuesday, July 27th and have ordered cars accordingly. Will wire you the car and order that we start on.

In the future we shall endeavor to advise acknowledgment of orders received, by separate letter, by return mail. And we think that it will be continuous shipping from now on as we anticipate no shut down except a possible short delay in installing our matcher when it arrives, which is an indefinite date.

#### Redirect Examination by Mr. PARSONS.

We were not troubled with having too few cars when we got orders except as I stated when we first received orders; the first order we received for shipment on the 28th day of June, we had asked for orders, and I think I read a letter last night where we asked for orders on the 9th, and insisted on getting orders right away. April 16th was the date of the contract, and I think the first order was received the 28th of June, nearly two months later; we couldn't order cars until we had the order a few days. As a lumber salesman with an experience [135—29] of 35 years, I think I could have sold all of this lumber in two weeks' time.

(Testimony of Ben W. Henderson.)

Recross-examination by Mr. HALL.

Exhibit "G," in which I said, "Gentlemen:  
\* \* \* we will give these orders immediate attention, but we are having trouble getting cars at the start \* \* \*," was written June 22d. That is the first car we had ordered; that is what I say, at that time we had some trouble.

Witness excused.

**Testimony of J. P. Lansing, for Plaintiffs.**

J. P. LANSING, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is J. P. Lansing; I am 57 years old; and my business is manufacturing lumber, in which business I have been for 35 years. I am now Sales Manager of the Polleys Lumber Company, which position I have occupied for 10 years.

I would fix the market price of lumber in 1920 by looking up our records, as to our sales at that time, and compare them with the sales made by other manufacturers. There is always a variation between the going price of lumber and the highest price. Explaining the difference between the highest market price and the ordinary or current market price—the going market price of lumber I take to be the average selling price by those who are manufacturing lumber and putting it on the market, whereas the conditions of the lumber market very frequently are such that it is possible to get more

(Testimony of J. P. Lansing.)

than the average price for lumber which you have to market. There are always variations, as a rule, between different manufacturers, from high to low [136—30] points. The variation between the highest market price and the ordinary or current market price of lumber depends entirely on the grade of lumber; on the low grades 51¢ or a dollar it might be, but on the higher grades of lumber ten or fifteen dollars possibly would not be too much. There was very little variation in the prices of lumber, the highest market price and the current or ordinary market price, between May 1st, 1920, and September 1st, 1920. On possibly one or two items it might have commenced to show a slight decrease, but on others there was a stiffening to make up for that. There was a stiffening of prices on the better grades of lumber, number one and better. At that time, I should say there was about \$10 variation. The general market didn't change much but there were sales made at higher prices in August and September. I never saw the character of the market any better, as far as the sale of lumber was concerned, from May 1st to September 1st, 1920; I would call it a good, stiff, steady market; it wasn't a runaway market at that time.

I have a copy of the bill of particulars which Mr. Donlan gave me; I have gone over that list of lumber as shown by the plaintiff's bill of particulars. I have extended the prices there, and examined the character of the lumber and the grades therein detailed, as stated on the list. There was a market for

(Testimony of J. P. Lansing.)

this lumber between the first day of May, and the first day of September, or the first day of August, the character of lumber that is indicated by plaintiffs' bill of particulars; that market was stiff; it was absorbing all that the buyers could get. In our own business we had an extensive milling and lumbering operation; I should say during that period the demand was fully equal to the supply. Taking this plaintiffs' bill of particulars, I think I could have sold that lumber between May [137—31] 1st and August 15th or September 1st, 1920. It would not have taken me over 30 days to sell it on the market at the prices I was going to fix on it, that is, from the period from May 1st to September 1st.

I would say that the highest market price available for the lumber enumerated in the bill of particulars Plaintiffs' Exhibit 8, as it was in the piles or as it was f. o. b. Fletcher Spur, in Flathead County, on the Indian Reservation, on August 3, 1920, was \$51.51; that is the result of my calculations and estimate. That is the amount in the pile. I would say that there was, from April 16th to the last of August, no variation in the price for the same character of lumber in pile in the same place, but during September, especially the latter part of September, some of the lower grades commenced to decline a little. That was due to the high freight rates principally.

Cross-examination by Mr. HALL.

The freight rates went into effect August 28, 1920;



(Testimony of J. P. Lansing.)

nobody knew what they were going to be, but they knew they were going to be advanced. The price of lumber was fixed by each individual operator that had it to sell. The larger operators got out a scale of prices, as individuals only. They are not, as a rule, very close together or very much alike. They all get out these discount cards monthly; we don't get one out every week; I don't know what the other people do. That is one way that the general trade familiarize themselves with the change in the prices of lumber. The discount card gotten out by the Weyerhaeuser Company and shown me by counsel, is the general way in which that particular organization only keeps track of the price of lumber. Some of the little millers follow that pretty well, and some don't. We do not, entirely. Between May [138—32] and September, as I remember it, our sales were equal to our cut. The lumber market reached the peak, I could say, in February, 1920. It then stood still for quite a while, up practically the time the new freight rates went into effect, August 28th. As a matter of fact, it had broken but very little before the first of August. I don't understand that it was a falling market from the first of August on. I know the Mann Lumber Company; I have not seen any of their discount sheets recently; I have at some times. They stand all right as a lumber manufacturing company. Their discount sheets are entitled to some credit to reflect their ideas as to the market, only.

(Testimony of J. P. Lansing.)

Redirect Examination by Mr. PARSONS.

The Polleys Lumber Company would not have been willing to pay this price for that lumber between May first and September first, that I fix, as it lay up there in that place, because we had plenty of lumber of our own. It could have been sold if we had no other lumber to sell.

Recross-examination by Mr. HALL.

I can't answer what it would have cost to plane it and load it in the cars up there, because I am not familiar with that operation up there.

Plaintiffs' Exhibit 8, then admitted in evidence over the defendant's objection that no proper foundation was laid, is in words and figures as follows:

**Plaintiff's Exhibit No. 8.**

(Priced by Joe Lansing. F. O. B. Pile. Average \$51,516.) [139—33]

Before 8/3 advanced on,				Feet	
817	pc's. 1 x 4—14	No. 1 & 2 Com.	45.00	3,813	171.58
781	—16	"	47.00	4,165	195.76
314	1 x 6—10	"	46.00	1,570	72.22
1093	—12	"		6,558	301.67
1094	—16	"	48.00	8,752	420.10
[139—33]					
83	1 x 8—8	"	46.50	443	20.60
226	—10	"		1,507	70.08
1229	—12	"		9,832	457.19
2877	—14	"		26,852	1248.62
5341	—16	"		56,970	2649.15
39	1 x 10—8	"	47.00	260	12.22
410	—12	"		4,100	192.70
482	—14	"	47.00	5,623	264.28
2940	—16	"		39,200	1842.40
22	1 x 12—8	"	48.00	176	8.45
159	—10	"	51.00	1,590	81.09

887	—12	“		10,644	542.84
511	—14	“	49.50	7,154	354.12
5109	—16	“	48.00	81,744	3923.71
#2	1 x 4 to 12—18 & 20 ft.		46.50	18,005	837.23
	All widths 10" 1"			1,675	77.89
	“ “ & lengths 1"			71,468	3323.26
566	pes. 1 x 4—10	No. 3 Com.	33.00	1,887	62.27
766	—12	”		3,064	101.11
1628	—14	“		7,597	250.70
539	1 x 6—10	“	36.50	2,695	98.37
997	—14	“		5,982	218.34
806	—14	“		5,642	221.26
1856	—16	“	37.50	14,848	956.80
203	1 x 8—8	“	34.50	1,083	37.36
376	1 x 8—10	“	37.50	2,507	94.01
1319	—12	“		10,552	395.70
192	—14	“		1,792	67.10
8955	—16	“		95,520	3582.00
50	1 x 10—8	“	34.50	333	11.49
514	—12	“	37.50	5,140	192.75
1207	—14	“		14,082	528.08
3114	—16	“		41,520	1557.00
40	1 x 12—8	“	38.00	320	12.16
197	—10	10	39.00	1,970	76.83
474	—12	“		5,688	221.83
1168	—14	“	38.00	16,352	621.38
7009	—16	“		112,144	4261.47
23	1 x 10—18	“	37.50	345	12.94
	Mixed widths and lengths 1"		37.50	8,177	306.64
No. 4 Boards			30.00	50,341	1510.23
No. 5 “			21.00	15,965	336.27
144	pes. 2 x 4—12	No. 1 Com.	49.00	1,152	56.45
367	—14	“		3,425	167.83
736	—16	“	51.00	7,851	400.40
114	—18	“	49.00	1,368	66.73
19	—20	“		253	12.40
8	2 x 6—10	“	50.00	80	4.00
169	—12	“		2,028	101.40
175	—14	“	50.00	2,450	122.50
725	—16	“	52.00	11,600	603.20
62	2 x 8—10	“	50.50	827	41.76
192	—12	“		3,072	155.14
290	—14	“		5,413	273.36

176 *Edward Donlan and Ben W. Henderson vs.*

1093	—16	“		23,318	1177.56
94	2 x 10—12	“	51.00	1,880	95.88
113	—14	“		2,637	134.49
356	—16	“		9,493	484.14
24	2 x 12—10	“	55.00	480	26.40
79	—12	“		1,896	104.28
95	—14	“	53.50	2,660	142.31
[140—34]					
429	—16	“	53.50	13,728	734.45
	2 x 6 to 12 asst. lengths		50.00	10,294	514.70
	1 x 4 Selects, C and better		79.00	131,787	10411.17
	1 x 6 “ “ “			78,235	6180.57
	1 x 8 “ “ “			50,683	4003.96
	1 x 10 “ “ “	83.00		43,510	3611.33
	1 x 12 “ “ “	89.00		8,112	721.97
	1 x 13 & wider, select, C & better	94.00		10,337	791.68
	1" mixed widths and lengths select, C & better	79.00		16,659	1316.06
	1 x 4—16 selects, C & better			1,877	148.28
	2" mixed widths and lengths selects, C & better	82.00		7,072	579.90
	4/4 Factory, C & better	73.00		85,538	6244.27
	5/4 “ “ “	80.00		2,763	221.04
	5/4 No. 1 Shop	75.00		8,287	621.53
				<hr/> 1,338,412	<hr/> \$72851.39
				<hr/> 1,338,833	
591 Pes.	1 x 4—12 No. 1 & 2 Com.	45.00		2,364	106.38
1281	—14	“		5,978	269.01
1457	—16	“	47.00	7,771	365.24
1644	1 x 6—12	“	46.00	9,864	4537.74
1824	—14	“		12,768	587.33
5017	—16	“	48.00	40,136	1926.53
1946	1 x 8—12	“	46.50	15,568	723.91
2371	—14	“		22,130	1029.00
9092	—16	“		96,980	4509.57
1746	1 x 10—12	“	47.00	17,460	820.62
1092	—14	“		12,740	598.78
6627	—16	“		88,360	4152.92
805	1 x 12—12	“	51.00	9,660	492.66
1126	—14	“	49.50	15,764	780.32

10705	—16	“	48.00	171,200	8221.44
	8 & 10 ft.		45.00	21,680	975.60
1471	1 x 4—12	No. 3 Com.	33.00	5,844	194.17
2501	—16	“	34.00	13,339	453.53
1541	1 x 6—12	“	36.50	9,246	337.48
1327	—14	“		9,289	339.05
4391	—16	“	37.50	35,128	1317.30
1289	1 x 8—12	“		10,312	386.70
1104	—14	“		10,304	386.40
6253	—16	“		66,485	2493.19
1183	1 x 10—14	“		13,802	517.58
4060	—16	“		54,133	2029.99
830	1 x 12—12	“	39.00	9,960	388.44
1119	—14	“	38.00	15,666	595.31
5545	—16	“		88,720	3371.36
	Mixed 19 & 20	“	37.50	18,180	681.75
	“ 8 & 10	“	34.50	5,025	173.36
	No. 4 Boards		30.00	207,539	6226.17
1838	2 x 4—12	No. 1 Com. Pine	49.00	14,704	720.50
2326	—14	“		21,709	1063.74
8218	—16	“	51.00	87,658	4470.56
12	—18	“	49.00	144	7.06
1	—20	“		13	.64
9	2 x 6—10	“	50.00	90	4.50
1082	—12	“		12,984	649.20
1962	—14	“		27,468	1373.40
[141—35]					
7133	—16	“	52.00	114,128	5934.66
82	—18	“	50.00	1,476	73.80
78	—20	“	50.00	1,560	78.90
19	—24	“		456	22.80
4	2 x 8—10	“	50.50	53	2.68
707	—12	“		11,312	571.26
1016	—14	“		18,966	957.78
3240	—14	“		69,120	3490.56
236	—18	“		5,664	286.03
20	—20	“		533	26.92
10	—24	“		320	16.16
2	2 x 10—10	“	51.00	33	1.68
338	—12	“		7,760	395.76
488	—14	“		11,387	580.74
1094	—16	“		29,173	1487.82
312	—18	“		9,360	477.36



178 *Edward Donlan and Ben W. Henderson vs.*

89	—20	"		2,967	151.32
8	—22	"		294	14.99
6	—24	"		240	12.24
2	2 x 12—10	"	55.00	40	2.20
166	—12	"		3,984	219.12
280	—14	"	53.50	7,840	419.44
1359	—16	"		43,488	2326.61
156	—18	"	55.00	6,616	308.88
23	—20	"		920	50.60
6	—22	"		264	14.52
7	—24	"		336	18.48
6	2 x 14—16	"	53.50	224	11.98
4	—24	"	55.00	224	12.32
1	2 x 16—10	"		27	1.49
8	—16	"	53.50	341	18.24
3	2 x 18—16	"		144	7.70
3	2 x 20—16	"		160	8.55
1	2 x 12—18	"	55.00	36	1.98
Mixed widths and lengths			40.00	28,444	1137.76
Cross strips, clear piles			33.00	54,109	1785.60
Roofs			30.00	11,206	336.18
1¼" Clears			83.00	19,268	1629.12
Wide Clears 1"			87.00	18,697	1626.64
Mixed " 1"			73.00	7,203	525.82
D & Better 1 x 4 clears				81,258	5931.83
1 x 6 clears				89,945	6565.99
1 x 8 "				61,484	4488.33
1 x 10 "			77.00	52,421	4036.42
1 x 12 "			82.00	26,367	2162.09
2" all widths and lengths			82.00	32,908	2698.46
				<hr/> 2,116,270	feet
Less, no advance				<hr/> 116,270	
				<hr/> 2,000,000	<hr/> 105123.35

Witness excused.

**Testimony of W. C. Lubrecht, for Plaintiffs.**

W. C. LUBRECHT, a witness called on behalf of the plaintiffs, having been duly sworn, testified as follows:

Direct Examination by Mr. PARSONS. [142—36]

My name is W. C. Lubrecht; I am fifty years old, and have been in the lumber business twenty-five years. My experience has been principally in the sales end of the business, and operation. I am now connected with the Anaconda Copper Mining Company at Bonner—used to be the Big Blackfoot Milling Company; I have been connected with that company 21 years at Bonner.

Explaining how the current market price of lumber is fixed on the one hand, and the highest market price on the other hand, and the difference between them, I will say the current prices, of course, are a matter of opinion, strictly, I would say, of the different sales organizations that are engaged in the lumber business. Of course, the competitive conditions through the different districts in the country, the yellow pine in the south, and the fir and other woods in the west, the California situation, and the Inland Empire, they all, in the natural economic workings of the industry, find a level, where they find their consuming markets, and it is the pressure from one region or the other that naturally holds the prices down, and the lack of pressure that permits them to rise. Explaining the difference between the highest market price and the current or ordinary market price, I will say that

(Testimony of W. C. Lubrecht.)

there are always some sales organizations, of course, who are what are known as "price getters," and they refuse to leave their products go at what would be considered the ordinary, average market; they seek the cream of the market, from the study they make of it, and find the trade that has the least pressure for forcing down the prices; and, of course, organizations of that kind who have the time and the personnel to secure this cream market naturally secure the highest prices. The variation between the ordinary and current market price of lumber and the highest market price in this [143—37] state wouldn't always be the same or anywhere near the same on account of the conditions of the market. You referred a while ago to the "runaway" market, and the "runaway" market, why, looking for the best prices, they can secure any price they ask, almost, if they can make deliveries of the stock that is desired; and in a depressed market, of course, it is a matter of urgency for one outfit or the other to get the money required to keep them floating for a while. I would say the variation between the average and the high, between May 1st and September 1st, in this community, would run somewhere between two to five dollars a thousand on some items, particularly the higher grades of items.

I have a copy of the bill of particulars, or inventory of two stocks apparently, supposed to be down at Pablo submitted to me by Mr. Donlan. I have gone over the character of this lumber, its

(Testimony of W. C. Lubrecht.)

grades, dimensions, sizes and quantity, as shown by this bill of particulars. As to what is the average price that I would fix on that lumber in Exhibit 9, 3,338,412 feet on August 3, 1920, there are several items here that were so specified, that it would be hard to tell without having made an examination of the stock, as to just what grade it would be or ship out; for instance, the 2" marked as #1 Common, I put a very conservative value on that, merely charging it up with the #3 board grade; as a matter of fact if it is the grade it is supposed to be, #1 Common, it would carry five or six dollars a thousand more values than I figured on that item. Assuming that my reduction is correct, I figured up the entire list at prices I was making on similar lumber at the period referred to, and averaged the total quantity at \$50.65 a thousand. Assuming it is #1 instead of #3, figuring on what the same class of #2 stock would average ordinarily, in our ordinary operations, and [144—38] on my experience, I would raise the general average for the entire amount about \$1.50, making it \$52.15.

I would say it was a seller's market from the first of May to the first of September, 1920, favorable to the seller, no pressure, very easy to sell lumber; it was a matter of making delivery and getting what stock was wanted. Assuming the bill of particulars, Exhibit 9, is correct, between the first of May and the first of September or October, if anyone was in position to guarantee good delivery and were in touch with the general markets in the country, with

(Testimony of W. C. Lubrecht.)

organizations of any size at all or competency, I think two or three weeks might have been sufficient to clean up a stock like that—to take up orders for a stock of that kind.

As I remember the market during the period from the first of May to the first of September, there was very little variation; in fact it was fairly well stabilized with most of the producers, although some were off the general market, either up or down, principally up; and from a little later than the first of May until the first of September, we didn't change our prices at all; we maintained a consistent, steady card on all sales that we could take or handle. The figures I gave are the absolute prices we were charging for all the sales we were making. Our prices were the Weyerhaeuser Sales Company prices; we simply adopted their card and stayed with it during that period. They were a little lower than some of the others, particularly on select items; some of the larger outfits in the Inland Empire were, as I remarked before, securing a little more for their selects; others might have been securing a little more; I didn't learn about that. [145—39]

Cross-examination by Mr. HALL.

I think a lot of the mills accepted the Weyerhaeuser list; it was a rather broken year and early in the year there was a runaway market and a disposition on the part of many of the manufacturers to try to stabilize it, and the Weyerhaeusers took the first tumble with the market in February in what they claimed to be efforts in stabilization



(Testimony of W. C. Lubrecht.)

and to head off the runaway, and in common with some others we adopted the course of staying with them in their efforts to do this, and we followed their card quite closely all year. The peak of the market was in February, would be my recollection. I don't think the Weyerhausers changed their prices until along in May after the February break; it was a little higher in May with some items, I believe. As to the general run of lumber, they adjusted up on commons, I believe, in May, and then June first they fixed the card, and that card was only in effect for a short time, and they made the slight change on June 12th or along about that time, and from then on to September first they guaranteed the prices against any advance and they maintained them. The market wasn't down during that period, I wouldn't consider, from my recollection of the market here, until away after, some time in September, when we first felt the declining.

I don't know anything about the quality of the lumber cut at Pablo only from hearsay; I know everyone that has talked about the lumber down there said they had a nice quality of pine; I don't know it myself. These prices I have given are loaded on the cars; that is, put through the planer and on cars.

Redirect Examination by Mr. PARSONS.

If that price were \$2.50, the yard price would be \$2.50 [146—40] deducted from the price which

(Testimony of W. C. Lubrecht.)

I gave—whatever the cost of this operation would be; I don't know. To make the yard price you have to deduct the cost of loading and the cost of milling.

Witness excused.

**Testimony of C. H. Richardson, for Plaintiffs.**

C. H. RICHARDSON, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is C. H. Richardson; I am the manager of the Western Lumber Company, and have operated in this country about 21 years. I have been in the wholesale lumber business about that length of time; I have been in the retail business for 35 years. I am general manager of the Western Lumber Company; I have had experience in sales and purchase of lumber. I would say the lumber market in this country between the 16th day of April and the first day of October or the first day of September, 1920, was a very good market for the seller. I don't remember of any great variation in prices during that period. There is a difference between the highest market value of lumber and the market value of lumber, which depends on circumstances. I have a list submitted to me by counsel or by Mr. Donlan, which is a copy of plaintiffs' bill of particulars.

Plaintiffs' Exhibit 9, identified by the preceding witness, was then, without objection, introduced in evidence, and reads as follows:

Plaintiffs' Exhibit No. 9.

8/30/20		Ave. \$50.65			
591 pcs. 1 x 4—12	No. 1 & 2 Com.		2,364		
1281 —14	"	8,342	5,978	48.00	400.42
1457 —16	"		7,771	50.00	388.55
1644 1 x 6—12	"		9,864		
1824 —14	"	22,632	12,768	40.00	1108.97
5017 —16	"		40,136	51.00	2046.94
[147—41]					
1946 1 x 8—12	"		15,568		
2371 —14	"		22,130		
9092 —16	"	134,678	96,980	49.50	6666.56
1746 1 x 10—12	"		17,460		
1092 —14	"		12,740		
6627 —16	"	118,560	88,360	50.00	5928.00
805 1 x 12—12	"		9,660	54.00	521.64
1126 —14	"		15,764	52.50	827.61
0705 —16	"		171,282	51.00	8735.38
8 & 10 ft.			21,680	49.50	1073.16
1471 1 x 4—12	No. s Com.		5,884	34.00	200.06
2501 —16	"		13,339	35.00	466.87
1541 1 x 6—12	"		9,246		
1327 —14	"	18,535	9,289	37.50	695.06
4391 —16	"		35,128	39.50	1387.56
1289 1 x 8—12	"		10,312		
1104 —14	"		10,304		
6233 —16	"	87,101	66,485	38.50	3553.38
1183 1 x 10—14	"		13,794		
4060 —16	"	67,927	54,133	38.50	2615.11
830 1 x 12—12	"		9,960	40.00	398.40
1119 —14	"		15,666		
5545 —16	"	104,386	88,720	39.00	4071.00
Mixed 18 & 20			18,180	38.50	699.90
" 8 & 20			5,025	37.00	185.93
No. 4 Boards			207,539	33.00	6848.77
1838 2 x 4—12	No. 1 Com.		14,704		
2326 —14	"	36,413	21,709	34.00	1238.06
8218 —16	"		87,658	35.00	3068.03
12 —18	"		144		
1 —20	"	157	13	34.00	5.34
9 2 x 6—10	"		90		
1082 —12	"		12,984		

186 *Edward Donlan and Ben W. Henderson vs.*

1962	—14	“	40,542	27,468	37.50	1520.33
7135	—16	“		104,098	39.50	4506.87
82	—18	“		1,476		
78	—20	“	3,036	1,560	37.50	113.85
19	—24	“		456	37.50	17.10
4	2 x 8—10	“		53		
707	—12	“		11,312		
1016	—14	“		18,966		
3240	—16	“		64,965		
236	—18	“		5,664		
20	—20	“		533		
10	—24	“	101,815	320		
2	2 x 10—10	“		33		
388	—12	“		7,760		
488	—14	“		11,387		
1094	—16	“		29,173		
312	—18	“		9,360		
89	—20	“		2,967		
8	—22	“		294		
6	—24	“	163,027	240	38.50	6276.54
2	2 x 12—10	“		120		
166	—12	“	4,104	3,984	40.00	164.16
280	—14	“		7,840		
359	—16	“	51,328	43,488	39.00	2001.79
156	—18	“		5,616	40.00	224.64
23	—20	“		920		
6	—22	“		264		
7	—24	“	1,520	336	40.00	60.80
6	2 x 14—16	“		224		
4	—24	“		224		
[48—42]						
1	2 x 16—10	“		27		
8	—16	“		341		
3	2 x 18—16	“		144		
3	2 x 20—16	“		160		
1	2 x 12—18	“	1,156	36	40.00	46.24
Mixed widths & lengths				28,444	38.50	1095.09
Cross strips, clear piles				54,109		
Roofs				65,315	11,206	30.00 1959.45
1¼ Clears				19,628	86.50	1697.82
Wide “ 1”				18,687	93.50	1747.23
Mixed “ 1”				7,203	79.00	569.04
1 x 4 clears				81,258		
1 x 6 “				89,945		

1 x 8    “	232,687	61,484	79.00	18382.27
1 x 10   “		52,421	83.00	4350.94
1 x 12   “		26,357	88.50	2332.55
2" all widths and lengths		32,908	88.50	2912.34
		<hr/> 2,116,270 feet		
Less, no advance		116,270		35153.82
		2,000,000	“	67756.14
			48.63	102909.94
		<hr/> Feet		
Before 8/3 advanced on.				
817 pcs. 1 x 4—14 No. 1 & 2 Com.		3,813	48.00	183.06
781                    —16    “		4,165	50.00	208.25
314            1 x 6—10    “		1,570		
1093                    —12    “	8,128	6,558	49.00	398.27
1094                    —16    “		8,752	51.00	446.35
83            1 x 8— 8    “		443	46.00	20.38
226                    —10    “		1,507		
1229                    —12    “		9,832		
2877                    —14    “		26,852		
5341                    —16    “	95,161	56,970	49.50	4710.47
39            1 x 10— 8    “		260	46.50	12.06
410                    —12    “		4,100		
482                    —14    “		5,623		
2940                    —16    “	48,923	39,200	50.00	2446.15
22            1 x 12— 8    “		176	47.00	8.27
159                    —10    “		1,590	55.00	87.48
887                    —12    “		10,644	54.00	574.78
511                    —14    “		7,154	52.50	375.59
5109                    —16    “		31,744	51.00	4168.94
1 x 4 to 12—18 & 20 ft.		18,005	49.50	891.24
All widths            10   “   1"		1,675	49.50	82.97
“            “            & lengths    1"		71,468	49.50	3537.67
556 pcs. 1 x 4—10 No. 3 Com.		1,837		
766                    —12    “		3,064		
1628                    —14    “	12,548	7,957	34.00	426.65
539            1 x 6—10    “		2,695		
997                    —12    “		5,982		
866                    —14    “	14,319	15,642	37.50	536.96
1856                    —16    “		14,848	39.50	586.50



188 *Edward Donlan and Ben W. Henderson vs.*

203	1 x 8—8	“		1,083	36.00	38.99
376	1 x 8—10	“		2,507		
1319	—12	“		10,552		
192	—14	“		7,792		
8955	—16	“	110,371	95,520	38.50	4249.28
50	1 x 10—8	“		333	36.00	11.99
[149—43]						
514	—12	“		5,140		
1207	—14	“		14,082		
3114	—16	“	60,742	41,520	38.50	2338.57
40	1 x 12—8	“		320	36.50	11.68
197	—10	“		1,790		
474	—12	“	7,658	5,688	40.00	306.32
1168	—14	“		16,352		
7009	—16	“	128,496	112,144	39.00	5011.34
23	1 x 10—18	“		345	38.50	13.28
Mixed widths and lengths, 1”				8,177	38.50	314.81
No. 4 Boards				50,341	33.00	1661.25
No. 5 “				15,965	25.00	399.15
144 pcs.	2 x 4—12	No. 1 Com.		1,152		
367	—14	“	4,577	3,425	34.00	155.62
736	—16	“		7,851	35.00	274.79
114	—18	“		1,368		
19	—20	“	1,621	253	34.00	55.11
8	2 x 6—10	“		80		
169	—12	“	2,108	2,028	37.50	79.05
175 pcs.	2 x 6—14	No. 1 Com.		2,450	37.50	91.88
725	—16	“		11,600	39.50	453.20
62	2 x 8—10	“		827		
192	—12	“		3,072		
290	—14	“		5,413		
1093	—16	“		23,318		
94	2 x 10—12	“		1,880		
113	—14	“		2,637		
356	—16	“	46,640	9,493	38.00	1795.64
24	2 x 12—10	“		480		
79	—12	“	2,376	1,896	40.00	95.04
95	—14	“		2,660		
429	—16	“	16,388	13,728	39.00	639.15
2 x 6 to 12 asst. lengths				10,294	38.50	396.32
1 x 4 Selects, C & better				131,787		
1 x 6 “ “ “				78,235		
1 x 8 “ “ “				260,705	50,683	82.00 21377.81

*Turner, Dennis & Lowry Lumber Co.*      189

1 x 10    "        "        "	43,510	86.00	3741.86
1 x 12    "        "        "	8,112	92.00	746.30
1 x 13 & wider, select, C & better	10,337	97.00	1002.69
1" mixed widths and lengths, select C and better	16,659	82.00	1366.04
1 x 4—16 selects, C & better	1,877	82.00	153.91
2" mixed widths and lengths selects, C & better	7,972	92.00	650.62
4/4 Factory, C & better Shop	85,538	48.00	4105.82
5/4 Factory, C & better	2,763	82.00	226.57
5/4 No. 1 Shop	8,287	74.00	613.24
	<hr/> 1,338,412	53.86	
			37461.07
			<hr/> 34623.14
			<hr/> 72084.21

Plaintiffs' Exhibit 10, then produced by the witness Richardson and admitted in evidence without objection, is in words and figures as follows: [150—44]

### Plaintiffs' Exhibit No. 10.

Old Yard			Average 49.90		
			Price		
			No. 1	No. 2	Com.
591	pes. 1 x 4—12	No. 1 & 2 Com.	69.50	2,364	48.00
1281	—14	"	"	5,978	48.00 "
1457	—16	"	71.50	7,771	50.00
1644	1 x 6—12	"	70.50	9,864	49.00
1824	—14	"	70.50	12,768	49.00
5017	—16	"	71.50	40,136	51.00
1946	1 x 8—12	"	69.50	15,568	49.50
2371	—14	"	"	22,130	"
9092	—16	"	"	96,980	"
1746	1 x 10—12	"	70.50	17,460	50.00
1092	—14	"	"	12,740	"
6627	—16	"	"	88,360	"
805	1 x 12—12	"	75.50	9,660	54.00
1126	—14	"	74.00	15,764	52.50
10705	—16	"	"	171,282	51.00
	8 & 10 ft.		"	21,680	Avg. #1 & 2—8" 59.5
1471	1 x 4—12	No. 3 Com.	200.06	5,884	34.00
2501	—16	"	466.86	13,338	35.00
1541	1 x 6—12	"	346.73	9,246	37.50
1327	—14	"	348.33	9,289	"
4391	—16	"	1387.56	35,128	39.50
1289	1 x 8—12	"	397.01	10,312	38.50
1104	—14	"	396.70	10,304	"
6233	—16	"	2539.67	66,485	"
1183	1 x 10—14	"	531.07	13,794	"
4060	—16	"	2084.12	54,133	"
830	1 x 12—12	"	398.40	9,960	40.00
1119	—14	"	610.98	15,666	39.00
5545	—16	"	3460.08	88,720	"
	Mixed 18 & 20	"	681.75	18,180	37.50
	" 8 & 20	"	173.36	5,025	34.50

No. 4 Boards		No. Com.		6848.79	207,539	33.00
1838	2 x 4—12			444.80	14,704	30.25
2326	—14	"		656.70	21,709	"
8218	—16	"		2739.31	87,658	31.25
12	—18	"		4.65	144	32.25
1	—20	"		.42	13	"
9	2 x 6—10	"		2.81	90	31.25
					(697,322)	
1082	—12	"			12,984	29.75
1962	—14	"		24720.15	27,468	"
7133	—16	"				
82	—18	"			114,098	30.75
78	—20	"			1,476	31.25
19	—24	"			1,560	"
4	2 x 8—10	"			456	32.25
707	—12	"			53	31.25
.016	—14	"			11,312	29.75
.240	—16	"			18,966	29.75
.236	—18	"			64,965	30.75
.20	—20	"			5,664	31.25
.10	—24	"			533	31.25
.2	2 x 10—10	"			320	32.25
.388	—12	"			33	32.00
.488	—14	"			7,760	31.00
.094	—16	"			11,387	31.00
.312	—18	"			29,173	31.50
.89	—20	"			9,360	32.00
.51—45]	—22	"			2,967	32.00
8	—24	"			294	33.00
6	2 x 12—10	"			240	33.00
2	—12	"			120	32.50
.66	—14	"			3,984	31.50
.80	—16	"			7,840	31.50
.59	—18	"			43,488	32.00
.56	—20	"			5,616	32.50
23 pes. 2 x 12—20	No. 1 Com.				920	32.50
6	—22	"			264	33.50
7	—24	"			336	33.50
6	2 x 14—16	"			224	33.50
4	—24	"			224	35.00
1	2 x 16—10	"			27	35.00
8	—16	"			341	34.50

# 192 Edward Donlan and Ben W. Henderson vs.

3	2 x 18—16	"		144	36.50
3	2 x 18—20	"		160	38.00
1	2 x 12—18	"		36	32.50
	Mixed widths & lengths			28,444	40.00
	Cross strips, clear piles			54,109	33.00
	Roofs			11,206	33.00
	1¼ Clears	D Sel	80.50	19,628	C Sel 87.50
	Wide "	1"	90.00	18,687	
	Mixed "	1"	87.00	7,203	
	1 x 4 clears	D Sel	73.50	81,258	C Sel 79.50
	1 x 6	" "	"	89,945	" " "
	1 x 8	" "	"	61,484	" " "
	1 x 10	" "	77.50	52,421	" " 83.50
	1 x 12	" "	82.50	26,357	" " 89.50
	2" all widths and lengths				
		D Sel	82.50	32,908	C Sel 89.50
<hr/>					
				2,116,270	feet
				116,270	"
<hr/>					
	Less, no advance			2,000,000	"
<hr/>					
New Yard					
Before 8/3 advanced on,			No. 1	Feet	No. 2
817 pes. 1 x 4—14	No. 1 & 2 Com.		69.50	3,813	48.00
781	—16	"	71.50	4,165	50.00
314	1 x 6—10	"	70.50	1,570	49.00
1093	—12	"	70.50	6,558	49.00
1094	—16	"	71.50	8,752	51.00
83	1 x 8— 8	"		443	46.00
226	—10	"	69.50	1,507	39.50
1229	—12	"	"	9,832	"
2877	—14	"	"	26,852	"
5341	—16	"	"	56,970	"
39	1 x 10— 8	"		260	46.50
410	—12	"	70.50	4,100	50.00
482	—14	"	"	5,623	"
2940	—16	"	"	39,200	"
22	1 x 12— 8	"		176	47.00
159	—10	"	75.50	1,590	55.00
887	—12	"	"	10,644	54.00
511	—14	"	74.00	7,154	52.50
5109	—16	"		81,744	51.00



*Turner, Dennis & Lowry Lumber Co.*      193

1 x 4 to 12—18 & 20 ft.		49.50	18,105	
All widths	10	"	1,675	
" " & lengths	1"	"	71,468	
2—46]				
64.16	566	pes. 1 x 4—10	No. 3	Com. 1,877 34.00
04.18	766	—12	"	3,064 "
58.30	1628	—14	"	7,597 "
01.06	539	1 x 6—10	"	2,695 37.50
24.33	997	—12	"	5,982 "
11.58	866	—14	"	6,642 "
86.50	1856	—16	"	14,848 39.50
38.99	203	1 x 8— 8	"	1,083 36.00
96.52	376	1 x 8—10	"	2,507 38.50
06.25	1319	—12	"	10,552 "
68.99	192	—14	"	1,792 "
77.52	8955	—16	"	95,520 "
11.99	50	1 x 10— 8	"	333 36.00
97.89	514	—12	"	5,140 38.50
42.16	1207	—14	"	14,082 "
03.52	3114	—16	"	41,520 "
11.68	40	1 x 12— 2	"	320 36.50
78.80	197	—10	"	1,970 40.00
27.52	474	—12	"	5,688 "
37.73	1168	—14	"	16,352 39.00
73.62	7009	—16	"	112,144 "
13.28	23	1 x 10—18	"	345 38.50
06.64	Mixed widths and lengths 1			8,177 37.50
<hr/>				
43.21				359,240
4 Boards				50,341 33.00
5 "				15,965 27.00
44 pes. 2 x 4—12	No. 1	Com	1,152	20.25
37	—14	"	3,425	"
36	—16	"	7,851	21.25
4	—18	"	1,368	32.25
9	—20	"	253	32.25
8	2 x 6—10	"	80	31.25
39	—12	"	2,028	29.75
5	—14	"	2,450	"
25	—16	"	11,600	30.75
32	8 x 8—10	"	827	31.25
2	—12	"	3,072	29.75
0	—14	"	5,413	"

194 *Edward Donlan and Ben W. Henderson vs.*

1093	—16	“	23,318	30.75
94	2 x 10—12	“	1,880	31.00
113	—14	“	2,637	“
356	—16	“	9,493	31.50
24	2 x 12—10	“	480	32.50
79	—12	“	1,896	31.50
95	—14	“	2,660	“
429	—16	“	13,728	32.00
	2 x 6 to 12 asst. lengths		10,294	50.00
	1 x 4 Selects, C & Better		131,787	C Sel 79
	1 x 6 “ “ “		78,235	“
	1 x 8 “ “ “		50,683	“
	7 x 10 “ “ “		43,510	83
	1 x 12 “ “ “		8,112	89
	1 x 13 & wider, select, C & Better		10,337	94
	1" mixed widths and lengths select, C. & Better		16,659	79
	1 x 4—16 selects, C & Better		1,877	C Sel 79
	2" mixed widths & lengths, selects, C & Better		7,072	“ 89
[153—47]				
	4/4 Factory, C & Better		85,538	73.00
	5/4 “ “ “		2,763	80.00
	5/4 No. Shop		8,287	75.00
			<hr/>	
			1,338,412	

(Testimony of C. H. Richardson.)

Direct Examination (Resumed).

By the WITNESS.—Assuming that lumber is of the grade, kind, character, dimensions and quantity as specified in plaintiffs' bill of particulars, I would say the price of the lumber from the first day of May to the first of October, 1920—the average, at the prices we were selling lumber at, I figure would be \$51.16 f. o. b. the car. Whatever it would cost to plane and load it would be deducted from my price. This extension of figures that is on the exhibit are my figures in each instance.

Cross-examination by Mr. POPE.

These prices I have mentioned are based on the assumption that the lumber was loaded on cars and ready to sell at that time.

Witness excused.

**Testimony of J. P. Flanagin, for Plaintiffs.**

J. P. FLANAGIN, a witness called on behalf of the plaintiffs, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is J. P. Flanagin; my age is 53; I am a lumberman, planing-mill man; I have been engaged in that business 35 years. I am now engaged at Pablo; in 1920 I was engaged at Pablo and Philomen Spur with Donlan & Henderson. I am familiar with this three million three hundred thirty-odd thousand feet of lumber that was burned on August 3d, 1920. I was working there at that time

(Testimony of J. P. Flanagin.)

operating the planing mill—that is, part of the time. I was operating in this particular yard and planing what [154—48] was planed of this particular lumber. The actual and reasonable cost, under the circumstances under which we operated, for planing and loading this lumber on the cars—that is, changing it from the pile to f. o. b., was about \$2.35 a thousand. The grades of this lumber overrun—that is, it graded better than what was in the pile in the rough. I mean that the #4 would grade anyway 15% better than #3 and better. After it was taken from the pile in the yard, the #4 which was graded at the sawmill, and the #4 in the pile in the yard, when it was taken out to be shipped would be re-graded, and the grade would run 15% better, or approximately that. The lumber was western white pine, the #4 common that I am speaking of. Comparing it with other lumber of similar character in this country, it was a little above the average.

From May first on I ran the planer; the capacity of the planer was thirty or thirty-five thousand for a 9-hour shift; for a double shift it would be double that. We had no labor difficulties or other difficulties to prevent us running it double shift if we so desired.

Cross-examination by Mr. TURPIN.

On April 16th we had at that mill at Pablo for siding lumber a Woods 15" 4-side machine, 15x6, and a Woods 8x6-8" wide and 6. We got a new

(Testimony of J. P. Flanagan.)

machine sometime during 1920; we got that after the fire. I said that the grades of the lumber ran a little better dressed than they were in the pile; a man by the name of Johnson did the grading. I know it was graded better from the fact that it was graded through and the #3 and the shot pack was put in separate bodies. I know that as to all of it; I know only as to that part dressed that it ran better; that out in the pile was only determined when it was [155—49] dressed. I said it cost \$2.35 to plane it, dress it and load it. The elements that go to make that up are the cost of labor against what was dressed and the feet that was dressed per day. We were paying labor at that time from \$5.25 to \$6.30. Peters, who actually worked in the mill dressing the lumber, I paid from \$5.50 to \$6.00 a day. Besides him we had an edger whom we paid \$6.25. We had a grader whom we paid \$7.00 or \$6.30. Besides them we had off-bearers and general labor men loading cars. We paid the off-bearers \$5.25 and \$5.50. Those are all prices per day of nine hours. We paid one of the men loading the cars \$5.50 and the other one \$5.25.

I am familiar with the averages of the different grades of lumber. I do not know how much those planing-machines cost that we had there; I don't know how much of an investment that was. Our power up there is a steam engine; we use shavings for fuel. We had an engineer to tend the engine and paid him \$6.25 a day.



(Testimony of J. P. Flanagan.)

Redirect Examination by Mr. PARSONS.

There was a deduction of \$1.25 a day kept from these men's wages for board.

Witness excused.

**Testimony of Ed. Donlan, for Plaintiffs.**

ED. DONLAN, one of the plaintiffs, called as a witness in their behalf, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Ed. Donlan; I am one of the plaintiffs in this case; I have been in the lumber and logging business for about 40 years. In that time I have cut in lumber, in Montana, over 254 million feet. 28 years of the time I have been in ~~the~~ lumber [156—50] business has been spent in the State of Montana. I am familiar with the character of the timber that was manufactured into lumber at our mill at Fletcher Spur during the months of April to November, 1920. The character of that timber and the lumber sawed from that timber was a very good—exceptionally good grade of pine—run well for uppers and shop lumber. I think that lumber was well graded.

Witness excused.

Plaintiffs rest.

DEFENDANT'S CASE.

**Testimony of Thomas S. Dennis, for Defendant.**

THOMAS S. DENNIS, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is Thomas S. Dennis; I am secretary and treasurer of the defendant in this case, and have held that office since the inception of the company in January, 1920. The nature of the defendant's business is the wholesale lumber business. The company comports or functions as most any wholesale lumber company would; we act as a sales agent, or sales organization, I will say, for those mills who haven't selling organizations of their own or haven't sufficient selling organizations to carry on; we act in the capacity, you might say, as backers to small millers who haven't sufficient capital to finance their own operations and require loans or advances in order to take care of their own operations. My personal duties are primarily in charge of the Inland Empire operations of the company; I handle both the sales and the orders for that division. By Inland Empire [157—51] I refer to the territory between the two ranges of mountains, comprising Montana, Idaho, Washington and Eastern Oregon.

In connection with this case I first met Mr. Donlan on or about April 14th, 1920, at Missoula. I first met Mr. Donlan at the Palace Hotel the

(Testimony of Thomas S. Dennis.)

day of my arrival here; it seems he had been in conference with Mr. Juneau a day or two previous in regard to the transactions proposed, had submitted a proposition to Mr. Juneau which he wired to me, enroute, at Salt Lake; I had wired Mr. Juneau a rejection of the proposal and counter proposals, and when I first met Senator Donlan our discussion was in connection with his proposal and my counter proposal. Senator Donlan advised me that he was contemplating the purchase of the Smead proposition at Pablo; that it had been stated that Smead was willing to sell, and before doing so he wanted to make a contract for the sale of all lumber which was on hand and any subsequent lumber which he might manufacture, after taking over the operation, and he offered to make a contract with us to sell all the lumber which was on hand at that time on the basis of the July, 1919, price list, using the f. o. b. mill basis price as a basis. This list referred to is the basis price list published, I believe, July 15, 1915. The Senator further proposed that in consideration of selling this lumber to us at that price we were to make him an advance payment of \$20 per thousand on the lumber then in pile, and a loan of \$20,000 to be paid in three and four months. I told the Senator that what Mr. Juneau had previously advised him represented our attitude towards that; that we were not in position at that time to consider any contract that anticipated our agreeing to any stipulated price; the market was in a very

(Testimony of Thomas S. Dennis.)

chaotic condition; it had reached the peak after a runaway market and there had been a price list issued by the Weyerhaeuser concern [158—52] which had been given wide publicity, stating that they were cutting their prices 30% and guaranteeing those prices until June 20th; that in the face of those conditions it would be impossible for us to contract for any operation that anticipated our agreeing to a stipulated price, but that we had made other contracts and offered to make the same character of contract with him, to handle the sale of his lumber, securing the best price we could, and charging a commission of 15% for our services, and if we could agree on details and conditions and his proposition looked favorable upon investigation and our company was able to swing the initial investment, I would be glad to consider a proposition of that kind. Senator Donlan stated that he didn't care for a proposition of that kind and when pressed for reasons, he said first that he wouldn't know whether he was getting full worth of any sale of that kind if he turned his lumber over to us and let us sell it for him, and second he wasn't sure that we would get the full, open price for him; I told him he could satisfy himself as to the latter by investigating our reputation in the Inland Empire, and as to the former we were perfectly willing to install some sort of system whereby he would receive certified copies of the invoices we sent out to our customers, or he would

(Testimony of **Thomas S. Dennis.**)

have the privilege of examining our books any time he wanted to.

We discussed the subject of securities because I explained it would be impossible for us to make any advances unless the operation would justify it and we were furnished proper security. Senator Donlan replied that that could be had all right by giving us bills of sale covering the money we advanced, and I told him that was acceptable to us, providing he would incorporate in the agreement that we were to have the lease on the ground on which the lumber was to be stacked, as I had heard [159—53] that a bill of sale wasn't binding in Montana, and he agreed to that, and that was left to the later details to be detailed after the examination of the property. I am not certain there was anything said about marking the lumber at that time; there was during this general conference. I am not certain whether the discussion for the insurance came up before I went to Pablo or after my return, but prior to the general conference in Mr. Violette's office in which the contract was drawn up I told the Senator we would have to be protected for our advancements by the insurance, and he said that was all right, and I said we would expect \$25 a thousand protection, and he said, "What is the \$25 a thousand for; you are only advancing \$20 a thousand?" I explained to him that in an operation of this kind anticipating a run of several months or indefinitely, we could not afford to tie up the heavy proportion of



(Testimony of Thomas S. Dennis.)

our capital in such an operation and devote my time and our western representative's time to the operation and put other items of expense into the handling of their operations before the lumber was in shipping shape and then have it all burn up and not have any manner in which we could recover the expenses we had invested.

On the 14th or 15th of April, about 11 o'clock we went to Pablo, went through the timber, the company's yard and over the proposition as fully as possible, finished about 7 o'clock and had supper there; I returned to Missoula that night, arriving about 11 o'clock. I saw Senator Donlan the next morning, told him I had examined the proposition and it looked favorable to me, and I would be willing to go ahead provided I received advices from our office that they could handle the advances. Later in the day I received that advice with some suggestions as to the extended payments. Mr. Donlan had requested that we give him \$60,000 cash and our company wired me that they could [160—54] handle it by making a \$20,000 cash payment, \$20,000 in two weeks and \$20,000 in 30 days. I notified Mr. Donlan of that. That was on the day after my trip to Pablo. Mr. Donlan said he would have to submit that to his banker, so we went and met his banker, Mr. Keith; Mr. Donlan submitted the proposition to him and he seemed a little disappointed, said he expected to get all of this in cash but he could arrange to take care of it if I reduced the time of the second payment to ten days



(Testimony of Thomas S. Dennis.)

and give him an acceptance, signed by myself as secretary and treasurer of the company, so that he could use them as cash items. I agreed to that. I saw Mr. Donlan that night after dinner; he said they had made their arrangements with Mr. Smead, we would wait until morning, get together and write up our contract.

We met some time before ten o'clock next morning; that was at Mr. Violette's office. Mr. Donlan asked me if I had any attorney I wanted to refer to; I told him no, I didn't know any attorney here; I would just leave it to his attorney, that we understood what we were attempting to agree to and we would just ask his attorney to get it up. I don't recall what Mr. Donlan said to that. Senator Donlan suggested we go to his attorney; I don't believe he mentioned his name until the next morning. I went to Mr. Violette's office in company with Mr. Donlan; Mr. Juneau was along. Mr. Violette was either not there or had just come in; at any rate within a short time he came.

Senator Donlan explained to Mr. Violette that we had this conference and had agreed on the basis for our contract and had come to him to prepare it; he then related in a general way the conditions that we had agreed to; whenever they didn't exactly state the situation as I understood it I called his attention to the discrepancy, but between us we presented our understanding of the case to Mr. Violette, who took notes down in longhand [161—55] as we explained the agreement to him. I can hardly

(Testimony of Thomas S. Dennis.)

explain what language or explanation was given to Mr. Violette at that time as to the agreement unless I go over all I said, because Senator Donlan simply repeated to Mr. Violette what we had discussed and agreed on between ourselves, that is, that he would agree to make the contract with us to handle the sale of his stock at Pablo, on certain conditions which imposed on us the necessity of making certain advances to them, and of obtaining the best prices for the lumber we could, and on the other hand imposed on them the necessity of giving us certain protection as security for our advances and loans and to pay us commission for handling his sales. The words and description of the understanding was substantially what I have testified to already.

After Mr. Violette had taken his notes he said it would take him a little while to go over them and get it up in legal form and suggested that we adjourn and come back after lunch, which was done. The contract had been made up in the meantime. This was either the 15th or 16th of April; it was the day following my first conference with Mr. Donlan; it was the date the instrument was signed. Plaintiff's Exhibit 5 seems to be the original instrument which was drawn by Mr. Violette in his office at that time; that is my signature attached thereto. I certainly read it over before I signed it. I didn't at that time make any particular notice that this was referred to as a contract of sale or pay any particular notice to any of the phraseology of the contract other than its intent. I might say, in ex-

(Testimony of Thomas S. Dennis.)

planation of that, that I am not at all familiar with legal phrases and terms and it would have been entirely useless for me to attempt to set up an examination of it as to its legal bearing, other than whether it stated definitely the agreement existing between us, which we were trying to cover by the document. [162—56] In respect to those provisions in the contract which state what the various parties were to do it seems to me to cover the case very clearly. If I saw the words which designate me and my company as the vendee, I simply read them through without giving them any consideration. Frankly, I didn't know just what the words "vendee" and "vendor" would mean in a document as establishing relationship. In regard to the agreement between ourselves and Senator Donlan as to the purposes which the bills of sale were to serve, I explained to Senator Donlan that we couldn't very well advance money to him without having some security to protect us in these drafts, and he stated that he was willing to give us these bills of sale as security; I explained that we were willing to accept bills of sale as security if we had a lease on the ground where where the property was stored so that we could enforce the bills of sale in case of necessity. The word "purchaser" in describing our company as the purchaser absolutely did not accurately represent the agreement that was entered into between myself and Senator Donlan prior to the drawing up of this instrument. I signed it in that form because in reading the document I examined it purely from

(Testimony of Thomas S. Dennis.)

the standpoint of whether it covered the obligations which each bore to the other and made no attempt to diagnose its phraseology or the manner in which it was drawn; the contract seemed so clearly to set out the things we agreed to do that that in itself satisfied me as to its effectiveness. As to my understanding of the meaning of the clause marked clause Five in the contract, I think it very clearly states that the bill of sale was to be given to us as security, but the bill of sale itself is hinged by the statement in the contract that it is subject to the balance which was to be due Donlan & Henderson on the fulfillment of the obligations which each of us undertook [163—57] to work out; that was my understanding at that time. Neither Mr. Donlan nor I, to my knowledge, suggested to Mr. Violette the use of the words “vendors” or “vendees”; we simply stated what we wanted to cover and left the contract, so far as I know, to Mr. Violette to work out himself. There was no suggestion, so far as I know, as to what words should be used, or phrases or language, respecting also the words “contract of sale” and “purchase.”

At the time the instrument here was signed I gave the banker, Mr. Keith, drafts for the amounts of money; those I have with me in my portfolio there.

By Mr. PARSONS.—We admit that these drafts were drawn on April 15th, in the sum of \$60,000, and that the plaintiffs received that amount in due course.

By the WITNESS.—\$40,000 of this \$60,000 de-

(Testimony of Thomas S. Dennis.)

livered to Donlan & Henderson was advanced on account of lumber. The contract stipulated that we were to make an advance of \$20 per thousand on 2,000,000 feet; that would be \$40,000. We received notes from Donlan & Henderson covering the remaining \$20,000; I have those notes. Defendant's "J" and "K" were the two notes given us by Donlan & Henderson at that time; they were executed by Donlan & Henderson and endorsed or signed by Donlan & Henderson by Mr. Henderson and Mr. Donlan. They are dated April 16th, and were given at the time of the execution of this contract.

Defendant's Exhibits "J" and "K," then admitted in evidence without objection, are two promissory notes, each for \$10,000, dated April 16, 1920, in favor of Turner, Dennis & Lowry Co., bearing interest at 7%, with the usual provision for attorney's fees, signed by "Donlan and Henderson, Ben W. Henderson, E. Donlan," the former being due four [164—58] months and the latter three months after date.

By the WITNESS.—One of those notes has been entirely discharged by applying credits on future advances as provided for in the contract. The contract provided for subsequent advances on lumber to be made by advancing in cash \$10 per thousand feet to Donlan & Henderson and applying \$10 per thousand feet upon these notes. As these advances were made on subsequent shipments of lumber by them, the amounts operated to entirely



(Testimony of Thomas S. Dennis.)

discharge the first of these notes. Such advances operated to pay the second of these notes to the extent of approximately \$3,300. After computing the interest from April 16th to August 3d, at which time the credit was set against this note, the credit of \$3,235.27 was applied, reducing the balance to \$6,975.32. August 3d is the date when one subsequent advance was made. At the time the notes and drafts were given the exchange of the bills of sale was made; there was one bill of sale delivered at that time; that is the one a copy of which is marked Plaintiff's Exhibit 1.

After we had passed these instruments back and forth I went to Pablo, looked over the operations a little more carefully than I had been able to before and talked over the conditions with Mr. Henderson and to get a line on his attitude toward selling the lumber at that time under the market conditions which existed then, and find out when he would be ready to take on orders, and so forth; the matter of orders was discussed in a general way. The subject of having cars shipped on as consignment shipments was discussed in a general way, just as an eventuality which might be deemed expedient in view of the congested condition of the traffic at that time; however, Mr. Henderson [165—59] was not in shape at that time to discuss taking on orders because of certain conditions which interfered with their shipping, so nothing of any definite nature was determined. The first of those conditions was that he hadn't yet completed his negotia-



(Testimony of Thomas S. Dennis.)

tions with Smead, and of course they were not at liberty to ship any lumber out until after the inventory was determined, and secondly, he felt that the machinery he had there was antiquated and the high cost of labor there at that time he couldn't afford to use that planer, and he had made arrangements to get a fast feed machine that would enable them to put the lumber out more quickly and at less cost. There was a request that we furnish him with an order for lumber in the shed already manufactured. I asked him to furnish me a memorandum of what he had, which he agreed to mail me later. There was possibly 100,000 feet in the shed.

I am not certain that this was the 17th I was up there with Mr. Henderson; I may have been in Missoula a day or two and may have gone there the following day. I next saw Mr. Donlan for a few minutes about two or three weeks later, when I was starting east after a trip west; that was before I went back to Kansas City. Subsequently I met Mr. Donlan in Chicago—about the middle of June. I went there on a wire from Senator Donlan to meet him in Chicago at the Great Northern Hotel; when I met him he stated that they were hard up and wanted to make another loan; I told him that was very unfortunate for us, coming at a time when money was as tight as it was; our collections were slow; he explained that they were not getting under way as rapidly as they had hoped and their advances weren't going to be enough to take care of their initial expense and wanted a little

(Testimony of Thomas S. Dennis.)

additional accommodation to continue operations; he said he thought they would have to have about \$20,000, and I further explained to [166—60] him our financial stringency, but told him I would do what I could. I wired Mr. Juneau to go to Pablo and take an inventory of all of the lumber which they had cut since they started their operations and to make an advance on all of the lumber instead of on finished piles, and that we would loan him the difference between that amount and the \$20,000 he required.

It is customary for manufacturers in storing lumber for seasoning to carry the piles up to a certain height and when it reached the height satisfactory to finish means that he puts a roof or covering of low-grade boards on it to protect the top pieces from the elements and leaves the lumber there to dry and season. Our contract was based on making advances only on covered piles.

After I made this explanation Mr. Donlan was very well satisfied. The advances were actually made on such inventory. I have two drafts covering that amount, \$20,000. That includes an advance on some 890 thousand feet which Mr. Juneau inventoried as being on hand, on which we advanced \$10,000, and the balance amount on \$11,000, covering the loan which we made at that time. Notes were given by Donlan & Henderson, evidencing that loan; those I have with me. Defendant's Exhibits "L" and "M" are the drafts covering the \$20,000 advanced to Donlan & Henderson as I related, pur-

(Testimony of Thomas S. Dennis.)

suant to my agreement with Mr. Donlan at Chicago. These drafts were July 5th, \$5,000; June 28th, \$15,000. Defendant's Exhibits "N" and "O" were the notes given by Donlan & Henderson at that time, executed by Donlan & Henderson by Mr. Donlan.

Defendant's Exhibits "L" and "M" then admitted in evidence without objection, are the two drafts for \$5,000 and \$15,000 above referred to. [167—61]

Defendant's Exhibits "N" and "O," then admitted in evidence without objection, are two promissory notes, dated June 28th, 1920, in favor of Turner, Dennis & Lowry Lumber Co., signed by "Donlan & Henderson, by E. Donlan," containing the usual provision for attorney's fees, and for the amounts, respectively, of \$5,000 and \$6,082.24, interest at 8%.

By the WITNESS.—We advanced the sum of \$20 per thousand feet by applying \$10 a thousand in cash and \$10 a thousand in liquidation or part liquidation of the first note from Donlan & Henderson. We advanced \$10 a thousand feet in cash on approximately 890,000 feet, and then advanced enough more to make a total of \$20,000. This additional amount is represented by these two notes, one for \$6,082.24 and one for \$5,000. It was agreed when these notes were given that we would handle the payment of these notes the same as the \$20,000 loan, or the two notes for \$10,000, issued at the time of signing the original document. That agreement was put in writing; Defendant's Exhibit "P" is

(Testimony of Thomas S. Dennis.)

the agreement to which I referred, executed by Donlan & Henderson and by Mr. Juneau on behalf of our company.

Defendant's Exhibit "P," then admitted in evidence without objection, reads as follows:

**Defendant's Exhibit "P."**

**SUPPLEMENTAL CONTRACT.**

That whereas, a contract of sale was duly made and entered into by and between DONLAN & HEDERSON, a copartnership, of Pablo, Montana, therein called the vendors, and TURNER, DENNIS & LOWRY LUMBER COMPANY, a corporation of Jackson County, Missouri, therein called the vendee, for the sale and purchase of "All of the lumber then owned by the vendors in pile at their sawmill yard at Fletcher Spur, near Pablo, Flat-head County, [168—62] Montana, and all lumber to be sawed, cut and manufactured by them *as* such Fletcher Spur sawmill hereafter until the 1st day of January, 1921;

And whereas, besides other matters stipulated in said contract of sale, the vendee paid to the vendors, as an advancement on the purchase price, the sum of \$20.00 per thousand feet on all lumber then in pile in the mill-yard, and agreed to pay and advance to the vendors the sum of \$20.00 per thousand feet on all lumber to be thereafter sawed, cut and manufactured by the vendors under and during the term of said contract, which payment would be made monthly, based upon an inventory

or finished piles in the mill-yard taken on or before the 10th day of each month, PROVIDING however, that \$10.00 per thousand feet of such advancement should be applied and credited on a \$20,000.00 loan made on that day by the vendee to the vendors, evidenced by a promissory note therein mentioned;

NOW THEREFORE, as a supplement to said written contract, the said parties have hereby agreed as follows, to wit:

That the vendee shall this day loan to the vendors the additional sum of \$11082.24, for which the vendors shall execute and deliver to the vendee two promissory notes of the following tenor, to wit, one for the sum of \$6082.24, due on September 1st, 1920 with interest thereon at the rate of eight (8) per cent per annum from date until paid, and the other for the sum of \$5000.00, due on October 1st, 1920, with interest thereon at the rate of eight (8) per cent per annum from date until paid, and that the sum of \$10.00 per thousand feet of the advancement provided for in the original contract shall be applied and credited on this loan of \$11082.24, in the same manner as provided for on the former loan of \$20,000.00

That this supplemental agreement is intended and understood [169—63] to be merely an addition to the original contract of sale herein referred to, and it is expressly understood and agreed that all the terms and conditions of said original contract of sale shall remain in full force and effect



(Testimony of Thomas S. Dennis.)

and unaltered in any other respect or manner than as herein specified.

In witness whereof, the said vendors and vendee have hereunto set their hands and seals this 28th day of June, 1920.

DONLAN & HENDERSON.

By ED. DONLAN.

TURNER, DENNIS & LOWRY LUMBER  
COMPANY.

By L. X. JUNEAU,

Its Agent.

By the WITNESS.—I don't know who prepared this contract; Mr. Juneau had it prepared on my instructions. Neither of these notes have been paid. The defendant is now the owner and holder of these notes offered in evidence, Defendant's Exhibits "O," "N" and "J," and were such at the time of the commencement of this action.

At the time I was with Mr. Donlan in Chicago, we discussed at considerable length shipping cars on consignment plan, of shipping them out without previous orders. I repeated my former question to Senator Donlan as to getting an expression from him as to his attitude toward the market, when he wanted us to sell his lumber and what class of business he wanted, and suggested to him that the freight congestion was becoming much more acute and the signs all pointed to a very severe car shortage for the latter part of the year, and it seemed to me if he waited he would find himself then with a quantity of orders to fill but inability



(Testimony of Thomas S. Dennis.)

to secure cars, and I suggested that it would be much better to go ahead and ship some of his lumber out on a consignment basis to be sold after the lumber was in transit, and I said that on account of the congestion in freight a car [170—64] which was actually rolling on wheels commanded a price and was much more readily sold than lumber which had to be shipped from the mill; nothing was there agreed on at that time. We discussed the various elements and went into the consignment business, the advantages to be gained and the disadvantages that naturally arose to offset the advantages, among which was the demurrage and penalty charges. A consignment shipment is moved toward a given destination; it arrives at that destination before it is sold and it is necessary to hold it there awaiting the opportunity to sell it, and the railroads provide that cars held beyond a certain length of time at any point will be subject to demurrage charges.

Our next advance was made on August 3d on approximately 445000 feet; the exact amount was 446,636 feet, on which we advanced Donlan & Henderson at that time \$10.00 per thousand feet, which was represented by a draft; we applied the remaining \$10.00 per thousand feet on the balance due on their notes.

We did not, prior to the date of their first request for orders, particularly send any communication to them about orders—no letter specifically relating to orders; there were several of our pre-

(Testimony of Thomas S. Dennis.)

vious letters in which we referred to this subject of orders and requested them to advise us when they were ready to take on orders. The first of those letters I find was May 17th; the next letter seems to be ours of June 7th addressed to Mr. Donlan; in the meantime we received a request for orders. Defendant's Exhibits "Q" and "R" are letters sent by us to Donlan & Henderson relative to orders for lumber. They were dictated and signed by me and posted in the usual manner in due course of mail. Defendant's Exhibit "S" is a letter received by us from them; that was the first request we had from them for orders. [171—65]

Defendant's Exhibit "Q," then admitted in evidence without objection, is a letter from the plaintiff to the defendants, dated May 17, 1920, addressed to Sam W. Henderson, c/o Donlan & Henderson, as follows:

**Defendant's Exhibit "Q."**

Dear Mr. Henderson:

We have your favor of May 8th, enclosing the memorandum of stock on hand in the shed and planing mill. We are glad to have this, and will make up orders in the next few days to cover this stock, so you may get this out of the way.

We have been waiting a few days before sending you orders for the #4 boards, thinking that the market would indicate more clearly just what could be expected in the next several weeks, but so far there is no disposition for conditions to settle

down to a more stable basis. The market is quite badly upset with quite a wide range of prices being quoted.

We will send orders to you during the next few days for several cars of #4 boards, and we believe it would be just as well to get some of this low grade stock in consumption now, rather than hold it against possible advances of the market which might not materialize.

\* \* \* \* \*

Defendant's Exhibit "R," then admitted in evidence without objection, is a letter from the plaintiff, addressed to Ben Henderson, c/o Donlan & Henderson, dated June 9, 1920, and reading as follows:

### **Defendant's Exhibit "R."**

Dear Mr. Henderson:

I am mailing you under separate cover, copy of The Retail Lumberman, showing Big Ben, and some of the other scenes taken from your operation. I am afraid the article does not do justice to the matter, but was the best that I was able to get [172—66] through on account of the limited space that the Retail Lumberman had to offer.

Certainly trust that conditions are rounding out in good shape for you now, and that you are beginning to hit on all four cylinders.

Please let us know just as soon as you want orders, as we want to keep the Planing Mill fully occupied when you finally get to the place of taking on business.

(Testimony of Thomas S. Dennis.)

The market is in such a deplorable condition at this time that we are not disposed to hasten the issue in any way, as we look for a stronger price situation a little later on than now prevails, but of course when you get ready to start shipping, you want to continue operating, and we want to be sure that you have orders on hand to take care of your full running time.

\* \* \* \* \*

Defendant's Exhibit "S," then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 10, 1920, as follows:

**Defendant's Exhibit "S."**

Gentlemen:

We have been waiting before starting to plane, for your new matcher, but have just been advised that it has not been shipped yet, so are going to plane with the machines that we have until it comes.

Kindly send us orders at once.

By WITNESS.—June 17th was the first order sent. Defendant's Exhibit "T" is a copy of a letter sent by us to Donlan & Henderson, containing an order for lumber, the first order we sent them. [173—67] Defendant's Exhibit "T," then admitted in evidence without objection, is a letter from the defendant to Donlan & Henderson, dated June 17, 1920, reading as follows:

(Testimony of Thomas S. Dennis.)

**Defendant's Exhibit "T."**

Gentlemen:

We are enclosing our order 616-D car of #4 Western White Pine S2S at \$51.00 Elwood City, Pa. This is sold at a good high price. It isn't very often that we can get an order at such a high price as this, but we are giving you full benefit as per our agreement on the sale of this stock.

What we want now, is a large car and prompt shipment, therefore please get this order out at once and oblige.

By the WITNESS.—There were no further requests from the plaintiffs for orders; we exchanged correspondence in regard to orders and we have a letter from them stating that they are leaving the matter of orders more or less to our judgment. Defendant's Exhibits "U," "V," "W," and "X" represent some of the correspondence that took place between us relative to orders and shipments of lumber; there were other letters, however, besides these; the balance of the letters were after June 30, 1920. Defendant's Exhibit "H" is also a letter upon the same subject, sent by us to Donlan & Henderson, relative to shipments.

Defendant's Exhibit "U," then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 16, 1920, reading as follows:

**Defendant's Exhibit "U."**

Dear Mr. Dennis:

I am in receipt of your letter of the 9th inst.  
\* \* \* You, no doubt before now have received  
our request for [174—68] orders, on receipt of  
which we will start the planer immediately. We  
have lost no time sawing.

\* \* \* \* \*

Defendant's Exhibit "V," then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 18, 1920, reading as follows:

**Defendant's Exhibit "V."**

Gentlemen:

We are in receipt of yours of the 14th inst., and note what you say of the present market condition, and of a likely improvement within the next thirty days.

There is nothing that we particularly desire to move at this time, and in the matter of orders; we are leaving that entirely in your hands. While we are anxious to get things moving towards steady shipments, we do not care to ship anything that would not justify us, and do not want to make any sacrifices just to ship at this time.

You are in constant touch with the eastern market, and based on that, and if you think that there is anything particularly that we would be justified in shipping, send us the orders.

Defendant's Exhibit "W," then admitted in evi-



dence without objection, is a letter from the defendant to Donlan & Henderson (attention Mr. Ben Henderson) dated June 25, 1920, reading as follows:

**Defendant's Exhibit "W."**

Dear Mr. Henderson:

We have your letter of June 16th and 18th.

We are certainly glad to know you feel disposed to leave the matter of sales in our hands, as we assure you that we have your interest as much or more at heart, than our own. We [175—69] could sell some stock at present by forcing the issue, but the market is almost dead; and practically the only stock that is being sold is an occasional order which fits some customer's immediate requirements.

There is little speculative buying being done, but only at ruinous prices, and prices which we do not feel disposed to meet unless under pressure.

We are quite anxious to realize on some of the funds which we have tied up in our various contracts, but we feel that we are serving our Mill connections best by not pushing their stock too hard on the present market.

Defendant's Exhibit "X." then admitted in evidence without objection, is a letter from Donlan & Henderson to the defendant, dated June 30, 1920, reading as follows:

(Testimony of Thomas S. Dennis.)

**Defendant's Exhibit "X."**

Gentlemen:

You will find enclosed invoice for car of lumber shipped yesterday. We have included larch as per your instructions, marked.

This car was not loaded to capacity, in fact we are unable to secure small cars here. Would appreciate if you would include fillers with your orders so that we may ship loaded cars and realize more on the freight.

By the WITNESS.—Following the letter of July 2d sending the standard loading, such cars were loaded by Donlan & Henderson and sent out on the road to destinations that we wired them. There were possibly eight or ten cars of specific orders showing the ultimate purchaser sent to Donlan & Henderson prior to the time of the fire, [176—70] which were put on file and not shipped. Six of those were actually shipped to Donlan & Henderson. There were four other cars shipped prior to the fire and one subsequent, making a total of 11 cars that were shipped. We have a letter from them in which reference was made to what stock of lumber the last car was shipped from. It seems that the final car was loaded at their own instance, and they wired us that they had loaded the car, and instructed us to wire them shipping instructions. I am not able to state from what source that lumber was procured. The other ten cars were shipments made prior to the fire; the total quantity that was shipped in these

(Testimony of Thomas S. Dennis.)

ten cars was approximately 285,000 feet. Refreshing my recollection the quantity referred to was 283,129 feet. Up to the date of the fire advances had been made on a total of 3,338,412 feet. Deducting the ten cars shipped the balance would be the amount of lumber in the yard at the time of the fire. There was 39,345 feet shipped in the 11th car. If it should develop by later testimony that the lumber so shipped in the 11th car was salvaged from the fire, and was a part of that on which advances has previously been made, deducting the ten shipments and the 11th shipment would give the amount destroyed by fire on which we had made advances.

There are two letters received from Donlan & Henderson dated August 3, 1920; Defendant's Exhibit "Y" was received by our company on August 6th; Mr. Donlan's signature is attached to that; that was received by due course of mail by our company.

Defendant's Exhibit "Y," then admitted in evidence without objection, is a letter from Donlan & Henderson to Mr. Thos. S. Dennis, c/o Turner, Dennis & Lowry Lumber Co., dated August 3d, 1920, and read as follows:

**Defendant's Exhibit "Y."**

Dear Sir:

Mr. Juneau has been here, and on inventory, we find that [177—71] we sawed 879,670 ft. since last inventory including Saturday, July 31st. Mr. Juneau left a draft amounting to \$4466.36, while the

(Testimony of Thomas S. Dennis.)

lumber that has been covered after deducting the \$10,000 note due you this month.

I would like to have an advance on the balance of the lumber that is in pile and not covered. The total amount would be \$17,953.40 less \$10,000 amounting to \$7953.40 and deducting sight draft that we now leaving a balance of \$3487.00.

I would appreciate it if you would send us or instruct Mr. Juneau to give us a draft for this amount.

I also would like to have our August advance for August cut regardless of whether or not the piles are covered.

If you can see your way to do this, I would appreciate it very much, as our bills have been quite heavy the past few months.

By the WITNESS.—I personally received information regarding the fire the first week in August; I was on the boat trip up on the Great Lakes, and received a wire from our office. I received a communication from Mr. Henderson stating the circumstances surrounding the fire. I believe that letter has been identified previously; the date of it is August 12th. I have not been able to find the short letter of August 12th having reference to the insurance. I have never prior to the fire inspected the fire insurance policies taken out by Donlan & Henderson upon the lumber upon which we had made advances. At the time of the fire I did not have any knowledge as to what insurance had been taken. Defendant's Exhibit "Z" is, so far as I

(Testimony of Thomas S. Dennis.)

know, a correct copy of a letter received by our company from Donlan & Henderson after the fire.  
[178—72]

Defendant's Exhibit "Z," then admitted in evidence without objection, is a copy of a letter from Donlan & Henderson to the defendant company, dated August 12, 1920, reading as follows:

**Defendant's Exhibit "Z."**

Gentlemen:

The insurance covering our yard is being adjusted satisfactory and your interests have been taken care of, proof of loss now being in our hands for signatures.

The loss of lumber leaves us with the following orders unfilled:

T-701-G. One car.

701-J. Two cars.

30002. One car. (Wire order.)

By the WITNESS.—The first advance after the fire was made by us on September 2d. Differing from the advances previously made, we advanced that one on the basis of \$20 a thousand in cash. The first reason for that was that Mr. Juneau requested authority from us to make an advance of \$20 a thousand, on the basis that Donlan & Henderson had asked for such an advance in order that they might resume their operations subsequent to the fire; the other was that we understood that the fire had wiped out all of the hang-over business



(Testimony of Thomas S. Dennis.)

before the fire, that we would be paid what was due us out of the insurance, that there was sufficient insurance to cover what was coming to us, aside from the first, and we agreed to make this advance on the representations that Donlan & Henderson were being seriously pressed for funds. At this time we advanced the full amount in cash without applying 50% of the advance due on that date to the notes, and Donlan & Henderson received the full \$20 a thousand feet on the cut made up to September 2d. The amount [179—73] of that advance was slightly in advance of 500,000 feet; it was exactly 514,499 feet. The next advance was made on September 30th; we advanced the \$20 per thousand straight; the amount of that advance was 401,315 feet at \$20 per thousand. At the time that advance was made I was at Pablo; had been there just a few hours, having gone there from Missoula. I left Kansas City about September 20th and came straight through to Missoula, where I saw Mr. Donlan. Mr. Donlan advised us that in the meantime drafts would come from one of the insurance companies for part of the insurance and we repaired to his bank at which he was to pay us the insurance which they had received. Mr. Donlan advised me that they had already received \$10,000 of the insurance from the Seattle company, which came very shortly after the fire; that was the Inter-Insurance Exchange. This



(Testimony of Thomas S. Dennis.)

they had used because they were so hard pressed for funds in getting started after the fire; he advised that there was \$70,000 waiting at the bank, coming from the \$70,000 insurance placed with the Old Line companies. He said, "I am going to give you \$60,000 of this and use the other ten, and we will pay the balance we owe you when the rest of the money comes." So we went to the bank and the drafts were there and they were drawn in our names jointly; I signed the draft; Senator Donlan did likewise and they were turned over to the banker who then issued drafts to us for the sixty thousand. Mr. Keith asked me not to deposit that right away until the releases which we had signed were returned to San Francisco, and I advised him that this was going to be mailed to Kansas City and it would be several days before it cleared, and he stated that that was satisfactory. It was in due course cashed.

In a day or so I went up to Pablo and had a talk with Mr. Henderson in regard to our affairs and our account and suggested [180—74] that I brought my records along with me and it would be advisable for us to compare our records and arrange a statement, showing what the status of our account was at that time; this took place at the mill office at Pablo; this was somewhere around the 25th of September. Mr. Henderson advised that Mr. Rapp was their bookkeeper and familiar with their rec-

(Testimony of Thomas S. Dennis.)

ords and suggested that Mr. Rapp and I go over these records and accounts together, which we did. He obtained his books of the various items and I showed him what our balances were against his and they seemed to agree substantially, and as a result of our conference we made out the statement purporting to show the status of our account at that time. We made a single statement and a copy from that. Mr. Rapp had manila memorandum paper in his office which he allowed me to use. Defendant's Exhibit 1, consisting of three sheets, is the paper on which that memorandum was made; that is the memorandum I retained that I made at that time; Mr. Henderson was present when this was made.

After the statement had been prepared, I handed a copy of it to Mr. Henderson and asked him to look it over, which he did; I then asked him if it was satisfactory and he said he didn't understand about the item of insurance; I asked him just what he meant and he said he didn't understand they were to protect us for a margin of \$5 a thousand on the insurance, which we had charged to him on this statement. I told him that as he had diagnosed the contract he apparently was entirely familiar with that because the matter was very clearly shown in the contract, and we were to be protected for \$25 a thousand on the lumber on which we had advanced. I went on to explain to him the reason

(Testimony of Thomas S. Dennis.)

for the necessity. He said that seemed logical; he understood how that was, but he hadn't understood it at the time the contract was made, and had he understood it [181—75] then he would have taken out more insurance on the lumber. I told him that the statement was subject to final revision, that it didn't contain the final adjustment on cars which were shipped, which would not be available until the freight bills and adjustments came in from the customers. The adjustment refers to these 11 carloads of lumber shipped; those cars were all sold at delivery prices f. o. b. the purchasers, and in handling those on our books we would set a credit to Donlan & Henderson's account to offset the debit which we set against the customer; in other words we gave Donlan & Henderson credit for our invoice price delivered to final destination, and in adjusting our account with them it was necessary for us to have the last freight bill from the customer in order that we might determine how much freight entered into the price, which was to be deducted in order to establish the f. o. b. mill price which had been obtained for the lumber. Aside from the item of freight on these cars I think there was nothing of major importance not available at that time; there may be minor corrections which either of us would have found, but nothing of a material nature. After this explanation of the \$5 a thousand feet insurance had

(Testimony of Thomas S. Dennis.)

been made by me, I don't recall that Mr. Henderson made any further objection to the statement as prepared. At that time I understood and had been advised that they had received \$70,000 from the Old Line companies and \$10,000 from the Seattle company.

We discussed quite extensively while I was in Missoula and vicinity what should be done on receipt of further sums from the insurance companies; that was at the time this statement was made and several days later when the advancement was made on the September 30th inventory. Mr. Henderson told me they were having some trouble getting the balance from the Seattle [182—76] Company; on receipt of that they agreed to pay us the balance which they owed us under this compilation which we had gone over; but the money did not come and it was necessary for me to go west, so I told Mr. Henderson as we were carrying considerable insurance ourselves with the same insurance agency on operations we had in Idaho, it was possible I might be able to bring some pressure to bear to hasten up the final adjustment, and he told me to do so, and on his part he promised to notify me immediately when he got anything from them himself, and I left Pablo and went on west to Spokane. When I was in Missoula Senator Donlan told me the balance would be paid with the remaining insurance money as soon as it was re-

ceived, and Mr. Henderson made the same statement when I was at Pablo. I know only in a general way when these subsequent insurance moneys were received by them.

Thereupon the hour of five o'clock P. M. having arrived, court was in recess until 9:30 o'clock A. M. the following day, at which time the direct examination of the witness was resumed.

Defendant's Exhibit 1, then admitted in evidence over the objection of the plaintiffs, is in words and figures as follows:

### Defendant's Exhibit No. 1.

Loans		(Sheet 1)
4/15—Due July 16 @ 7%		10,000.00
4/15— Aug. 16 @ 7%		10,000.00
6/28— Sept. 1 @ 8%		6,082.24
6/28— Oct. 1 @ 8%		5,000.00
Advances on lumber		
4/15 2,000,000 ft. @ 20.00		40,000.00
6/28 ( 891,776 " @ 20.00	17835.52	
8/ 3 ( 446,636 " @ 20.00	8932.72	
(		
(	26768.24	
( Less 10.00 per M applied on loan	13384.12	13,384.12
		<hr/> 84,466.36
[183—77]		
Plus insurance at 5.00 per M on the lumber		
advanced on 3,338,412 @ 5.00		16,692.06
		<hr/> 101,158.42
Interest to 10/1		2,271.58
		<hr/> 103,430.00
Credits.		
Advance and insurance on shipments prior to fire		
—284,023 ft. @ 25.00		7,100.57
		<hr/> 96,329.43
Bal. due, including interest to Oct. 1st, Less		
Draft		60,000.00
		<hr/> 36,329.43
Bal.		

(Testimony of Thomas S. Dennis.)

(Sheet 2)

Shipments			
Date	Car Number	Quantity	
6/29	(87426 Pa.	21038 ft.	21048
7/ 1	(75494 N. H.	28844 "	27938
7/ 1	(37558 B. & A.	25597 "	25597
7/ 9	(38703 I. C.	26269 "	26269
7/10	(40368 B. & M.	28510 "	28510
7/12	(56461 N. Y. C.	34272 "	34272
7/12	(155093 R. I.	36937 "	36937
7/30	(130074 Soo.	27699 "	27699
8/ 1	(61665 N. & W.	27200 "	27200
8/ 2	(558814 Pa.	27657 "	27659
		<hr/>	
		284023	
8/12	Shipment		
	Car #78564	39345 ft.	
		<hr/>	

(Sheet 3)

Interest		
60,000.00 @ 7% from 4/15 to 10/ 5½ months		1925.00
8,917.76 @ 7% From 7 /1 to 10/1 3 months		156.06
11,082.24 @ 8% From 7/ 1 to 10/1 3 months		221.64
4,466.36 @ 7% From 8/ 1 to 10/1 2 months		52.10
<hr/>		<hr/>
84,466.36		2354.80

Interest Credits.

Shipments 6/29 to 7/ 1— 75479 ft. @ 20.00	1509.58
Shipments 7/ 9 to 7/12—125988 ft. @ 20.00	2519.76
Shipments 7/30 to 8/ 2— 82556 ft. @ 20.00	1651.12
<hr/>	<hr/>
1509.58 @ 7% From 7/1 to 10/1, 3 months	26.42
[184]	

By the WITNESS.—Defendant's Exhibit 2 is an exact carbon copy of the telegram sent by our company to Donlan & Henderson October 28th, 1920. The original wire was sent on that day in the usual manner through the Western Union Telegraph Company.



(Testimony of Thomas S. Dennis.)

Defendant's Exhibit 2, then admitted in evidence without objection, is a Western Union Telegram, dated October 28, 1920, from the defendant to Donlan & Henderson, reading as follows:

**Defendant's Exhibit No. 2.**

Inter Insurance Exchange advise forwarded you twenty thousand Tuesday our financial requirements are very urgent and pressing and we trust you will forward this amount to us quickly will greatly appreciate your co-operation kindly wire us definite advice.

By the WITNESS.—I have the telegram received in reply to this one; Defendant's Exhibit 3 was received by us on October 30th, delivered to us by the Postal Telegraph Company of Kansas City.

Defendant's Exhibit 3, then admitted in evidence over the objection of the plaintiffs, is a Postal Telegraph telegram, dated Oct. 30, 20, from "Donlan" to the defendant company, reading as follows:

**Defendant's Exhibit No. 3.**

Nothing recd to date from Inter Insurance Exchange Seattle will forward soon as get it Will advise you. [185—79]

By the WITNESS.—On the 8th of November, 1920, an advance was made by Mr. Juneau in the nature of a draft. 699,972 feet of lumber had been scaled from September 30th inventory up to that time. \$20 per thousand feet upon that amount

(Testimony of Thomas S. Dennis.)

would be \$13,999.44. The draft for that amount was not paid in cash by us, because at the time the draft was presented to us Donlan & Henderson owed us considerable more than that amount, which debt was past due, and we applied this \$13,999.44 as a credit against the balance of their indebtedness to us. This was after the time that we had made the two advances of a full \$20 per thousand feet in cash; those advances were greater than called for by the contract, and had been made in September.

The bunch of invoices marked Defendant's Exhibit "B" are the invoices covering the shipments of cars of lumber by Donlan & Henderson; they are in their proper chronological order. The first three cars of lumber differed from the remainder by reason of the fact that they were shipped on orders furnished to Donlan & Henderson, showing that the sale had been made prior to the shipment of the car, showing the consignee and the price on which they were sold, and final destination; they further differ by reason of the fact that on these three cars Donlan & Henderson drew on us for the estimated net proceeds coming to them after deducting the estimated freight and our commission in line with the provisions of the contract, and on no subsequent shipments did they draw on us. The three cars were covered by one draft, which was honored. The freight only was an estimate; a person that knew the freight would necessarily know the commission, as the commission would be figured on the

(Testimony of Thomas S. Dennis.)

exact net proceeds, and at the time the draft was drawn, the freight not being known, they estimated the freight. Our [186—80] commission of 15% would be on the net proceeds less the freight; the freight would not be known then. After the freight returns had been received by us, I think on one of those cars there was still a balance due them, and on the other two the freight bills established the fact that they had overdrawn on them. The three cars were overdrawn approximately \$50, as shown by final settlement. For the remainder of the cars they didn't draw drafts upon shipment. As the cars were shipped they were then entitled to a credit on the footage in each car of \$20 per thousand feet. After the returns came in from the ultimate purchaser, remittance was then made to Donlan & Henderson in detail, setting up what charges had been made against them on the shipment and what balance was due them in settlement of each individual shipment. The report showing the freight was all covered on each individual car by the individual remittance on that car to Donlan & Henderson. With the remittance there was no invoice of ours; they had been furnished with a copy of the invoice when the sale was made, and accompanying this remittance of ours to them was the original paid expense bill sent in to us by the purchaser for credit. Those were forwarded to Donlan & Henderson in the regular mail. I have not complete copies of them. Defendant's Exhibit 4 is a report

(Testimony of Thomas S. Dennis.)

covering the freight and proceeds on one of these cars of lumber, except that it does not include our statement of settlement transmitted to them at the time the expense bill was sent to them. That refers to the first car which they shipped. At counsel's request I segregate from that bunch of papers the first three cars that were shipped.

Car No. 38703, Illinois Central—we gave Donlan & Henderson credit on that car for \$1665.41; we debited them with freight in the amount of \$267.90, excess freight charges \$48.41, [187—81] reconsignment \$5, war tax on reconsignment 15¢, 15% commission to us \$209.63, credit to their account of \$20 per thousand covering the amount originally loaned on shipment \$525.38, 2% cash discount on the balance \$23.76, balance set to their account of \$585.18. That was of date November 27th and is all summarized in the paper which I have here, and which is a carbon copy of our settlement which we furnished them at the time we sent them the original expense bill previously referred to. That is Defendant's Exhibit 5.

Defendant's Exhibit 5, then admitted in evidence without objection, is a tabulated statement headed with the name of the defendant company, dated November 27, 1920, addressed to Donlan & Henderson, and tabulating the figures given in the preceding paragraph of the witness' testimony.

By the WITNESS.—The original of that was mailed in due course of business to Donlan & Hen-

(Testimony of Thomas S. Dennis.)

derson, together with the freight bill, which was receipted by the railroad company at its final destination. This was mailed to Donlan & Henderson on December 18th. There was an overcharge on the freight amounting to \$48.41, and in making the settlement with us the purchaser deducted the full amount of the freight bill and in making our settlement with Donlan & Henderson we also deducted the full amount of freight charged, as shown on the overcharge item in freight of \$48.41. We sent them a form and advised them if they would return the original expense bill we would remit to them the amount of overcharge and use the expense bill as a basis for filing a claim against the railroad for the overcharge; that was not done. [188—82]

The next car was No. 40368 B. & M.; the total credit set to Donlan & Henderson's account on this car was \$1630.53, from which we deducted freight \$346.47, demurrage \$231, reconsignment of \$10, war tax on demurrage and reconsignment \$7.23, 15% commission to ourselves \$192.61, a credit of \$20 per thousand to them covering the amount of the original loan, total \$570.20, 2% cash discount \$21.83, leaving a balance due them of \$251.19. Defendant's Exhibit 6 is a carbon copy of such memorandum sent to Donlan & Henderson by us; on December 18th; the freight in this car was computed as it was in the other case. The charge of \$231 covers



(Testimony of Thomas S. Dennis.)

the demurrage assessed by the railroad company while the car was standing on the track at recon-signing point waiting a satisfactory sale of the lumber. This was what is commonly known as a transit car. We found a customer for this car and made a sale as soon as we were able.

Defendant's Exhibit 6, then admitted in evidence without objection, is a statement headed with the name of defendant company, dated November 27, 1920, addressed to Donlan & Henderson, and tabulating the figures given in the preceding paragraph of the witness' testimony.

By the WITNESS.—Defendant's Exhibits 7, 8, 9, 10 and 11 are similar carbon copies of reports sent to Donlan & Henderson, showing the proceeds and return on the cars shipped, sent them in due course of business, on December 18th, 1920. The freight in each case which was deducted was ascertained in the same manner as the freight mentioned heretofore on the cars I testified to. There were also overcharges in freight on several of these cars similar to the one I previously described, which were deducted in our settlement with Donlan & Henderson; we followed the same [189—83] procedure, sending them a copy of our corrected freight and the freight charged, with the statement that if they would return the original expense bills to us we would file our account for overcharge; that was not done. The total of these overcharges on freight on the three cars was about \$199; on car 155093,



(Testimony of Thomas S. Dennis.)

\$94.44; car 54641, \$48.06; car 61665, \$56.04. The demurrage mentioned in Defendant's Exhibits 7, 8 and 11 was in each case a charge incurred under the same circumstances previously described with reference to the other car; those were transit cars, and the demurrage was incurred during the time we were finding a customer for them.

Defendant's Exhibit 7, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated November 27, 1920, showing a credit "Your invoice" \$2114.56, and debits, freight \$536.38, excess freight charges \$94.44, war tax \$4.62, demurrage \$144, reconsignment \$10, commission 15% \$236.73, credit \$20 per M. on 36937 ft. \$738.74, discount \$26.83; Bal. due mill \$322.82.

Defendant's Exhibit 8, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated December 31, 1920, showing a credit "Your invoice" \$1985.56; and debits, freight \$521.27, excess freight charges \$48.06, war tax \$6.93, demurrage \$224, reconsignment \$7, commission 15% \$219.64, credit \$20 per M. on 34272 ft. \$685.44; Bal. due them \$257.64.

Defendant's Exhibit 9, then admitted in evidence without objection, is a tabulated [190—84] statement from the defendant company to Donlan & Henderson, dated December 31, 1920, showing a credit "Your invoice" \$1218.76; debits, freight \$302.67,

(Testimony of Thomas S. Dennis.)

commission \$137.41, credit \$20 per M. on 27699 ft. \$553.98, discount \$15.57, Bal. due mill \$209.13.

Defendant's Exhibit 10, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated

November 27, 1920, showing credit "Your invoice \$1217; debits, freight \$306.43, 15 % commission \$136.59, credit \$20 per M on 27659 ft. \$553.18, discount \$15.48. Bal. due mill \$205.32"; with the notation "Amount of \$205.32 transferred to Fire Adjustment Account as at 9/21/20."

Defendant's Exhibit 11, then admitted in evidence without objection, is a tabulated statement from the defendant company to Donlan & Henderson, dated November 27, 1920, showing credit "Your invoice" \$1687.57; and debits, freight \$342.48, excess freight charges \$56.04, war tax \$.06, demurrage \$2, commission 15% \$201.76, credit \$20 per M on 27,200 ft. \$544, discount \$22.87; Balance due mill \$518.36.

By the WITNESS.—The total credits shown here represent the sale price at the final destination which included freight; that is what the customer paid for the lumber; and he paid the freight remitting the balance to us. The demurrage was paid by the customer as a freight charge for the car. The figures marked in each case "your invoice" represented the full price obtained by our [191—85] company for each of these cars of lumber; to the best of my knowledge they were the highest prices obtainable by us.

(Testimony of Thomas S. Dennis.)

Explaining the reconsignment charge, that is a car service charge imposed by the railroad companies on cars consigned to one destination and ultimately reconsigned to another destination. It is the custom of the railroads in cases of all cars which have changed in their destination.

In some instances in the freight bills the one document covers both the carrying charges and the demurrage charges, and in other instances the carrying charges are shown on one document and the demurrage on another. Defendant's Exhibit 12, consisting of seven sheets, all represent the receipted expense bills, showing the various items of car service, reconsigning charge and demurrage, deducted in our settlement with Donlan & Henderson. They were received by us from the customer to whom we sold the car, in each case. We used these as a basis for making our charge against Donlan & Henderson, and furnished or forwarded these expense bills to them with the usual settlement blanks. If the lumber is purchased by the customer on the basis of price delivered at his station, it is the custom in the lumber trade for the customer to pay the freight, receipt the freight bill and remit them to the person from whom he purchased the lumber; these cars were all sold delivered to the customer's track, and these freight bills were then remitted pursuant to the universal custom in the lumber trade in cases of that kind, to us; they all show the receipt of the railroad company.

Defendant's Exhibit 12, then admitted in evidence

(Testimony of Thomas S. Dennis.)

without objection, consists of seven sheets of paper, severally on the following import: Sheet No. 1, a freight bill showing total charges on car I C 38,703 of [192—86] \$5.15; Sheet No. 2, a freight bill showing total charges on car B & M 40,368 of \$178.19; Sheet No. 3, a freight bill showing total charges on car B & M 40,368 of \$70.04; Sheet No. 4, a freight bill showing total charges on car C C & St. L 56,461 of \$798.90; Sheet No. 5, a freight bill showing total charges on car 56,461 of \$20; Sheet No. 6, a freight bill showing total charges on car 56,461 of \$4; Sheet No. 7, a freight bill showing total charges on car 61,665 of \$410.85.

By the WITNESS.—With respect to the cars on which demurrage was charged, our company made the most expeditious disposition we could without sacrificing the value of the lumber. To the best of my knowledge, the net price we obtained, after deducting the demurrage, was the highest obtainable price under the circumstances, considering as one of the circumstances the fact that these cars were so shipped that they were to be sold in transit. I have been engaged in the lumber business for 16 years, and the buying and selling of lumber for about nine years. About two years of that experience has been in connection with western pine and lumber such as that produced in Montana.

I testified yesterday that in my conversation with Mr. Donlan he offered to sell the lumber which he had purchased from Smead on the July, 1919, list basis. Quantities of lumber such as that

(Testimony of Thomas S. Dennis.)

at Pablo in the Donlan & Henderson yard at the time of the fire have been sold in bulk. The effect of such a sale upon the market value of the lumber would depend quite considerably upon the conditions surrounding the sale, as to whether or not it anticipated an established price over an extended period of time, what the terms of payment were, and so forth. The price in bulk of that quantity of lumber which [193—87] would be paid on the market would necessarily be considerably lower than the price that could be obtained for individual carload lots of the same lumber shipped on board cars. A great many elements would enter into that; one is, it would be impracticable to ship such a volume of lumber in the limited length of time; it would require considerable time to ship it and the purchaser would have to assume the risk of the market changing during that period, and there would be a considerable amount of expense involved in marketing that lumber to its ultimate destination; there would be an uncertainty as to the quality of the lumber after it was thoroughly seasoned and milled and loaded on the car; there would be a great many items contained in bulk sales of that kind which would not be readily marketable. During the spring and summer of 1920, we were engaged in purchasing or negotiating for stocks of lumber in bulk or as they come from the mill in western Montana in similar character to those which existed up there at the Donlan & Henderson mill.



(Testimony of Thomas S. Dennis.)

I know that such sales in bulk of the entire output of a mill as it came from the mill were being made at that time. There were variations in the market value of such stocks of similar quantity and quality at that time and in the month of August, 1920; I personally know of some sales made as low as \$26 per thousand for the mill run f. o. b. their mill to the purchaser's order, and I know some sales made as high as \$30.50 per thousand. I would say that a liberal estimate of the high market value of the bulk stock of lumber, mill run, of the character of that at Donlan & Henderson's plant, planed and loaded on board car according to the purchaser's requirements, on the 3d day of August, 1920, would be \$30. I believe that value would cover a general run of lumber, some of which would be dry and in shipping condition and the balance of which would come [194—88] into shipping condition at a later date. Our company made three purchases of bulk mill run stocks during that period similar to those stocks at Donlan & Henderson's mill. In the latter part of January we made a purchase of that nature from the McKenzie Brothers of the output of their mill from January to May 1st at Hot Springs, Montana, for \$30 per thousand delivered on board cars at mill and loaded according to our order; the latter part of January we made a similar purchase from Charles Beardmore at Priest River, Idaho, for \$27.50 per thousand, mill run, dressed and loaded on board cars according to our order; and



(Testimony of Thomas S. Dennis.)

the latter part of August we made a similar purchase from the West and Duffy Company at Spokane of some million and a half feet that they had in pile at Priest River, Idaho. The latter purchase was substantially #2 common and a better shipment. For that we paid \$30.50 per thousand milled and loaded to our order on board cars.

I was well acquainted with the lumber market for western white pine from November, 1919, to January 1st, 1921; that includes the period of time during which this lumber was being manufactured. The market was in a very chaotic condition over practically the entire period; in November an immense amount of buying started which resulted in a runaway market, extending through November, December, January and possibly the first half of February; during that period buyers of lumber were quoting almost any offer over the asked price of mills to be given preference on stock. That condition extended up to the early part of February, after which it began to subside somewhat. The market apparently had played itself out, at least began to die down somewhat and buyers began to settle down and get their breath; only small opposition was springing up over the country to keep the high prices up; quite a good many retail [195—89] associations at their annual conventions adopted resolutions condemning the manner and the fellows for running the prices up and along about the middle or 20th of February the Weyerhaeuser Sales Company, one of the big fellows in the

(Testimony of Thomas S. Dennis.)

western<sup>\*</sup> pine market, issued a new price list and published to the world that they were going to stabilize lumber prices and were making a cut of 30% in their prices which would be guaranteed against advance until June 1st.

The announcement of the freight increase for the latter part of August had a tendency of decreasing the purchase of bulk lots in the west and increasing their purchase in the southern states on the theory that the increase in freight rates would establish a sort of bar against western shipments; however, it stimulated buying of cars which could be shipped out in 30 days to six weeks on the theory that if they could be shipped before the freight rate went into effect it would give the purchaser the advantage of that increase in freight.

Western white pine produced in Montana and Idaho belongs to the same family; there is a difference to some extent between them and between the western white pine of different sections of Montana; however the general nature is substantially the same, and on the average the same so far as value is concerned.

In taking the lumber which has been graded in the yard and running it through the planer, it might be possible to increase the grade if the lumber was very loosely or poorly graded in the green stage, and when handled through the sawmill it would naturally shrink in value by the time it had been sawn and had been run through the

(Testimony of Thomas S. Dennis.)

planing mill, by reason of certain defects which developed during that time. That is the undisputed rule in the case of lumber such as this. [196—90]

I haven't seen the full bill of particulars but only that portion which referred to the 2,000,000 feet of lumber. I have figured what per cent of that 2,000,000 feet is contained in the varying grades of lumber there specified. As itemized in the bill of particulars it develops 18½% of selects, 26% #1 and 2 common, 20% #3 common, 10% #4 common, 25½% of dimension. I mentioned the highest values first and the lowest last. I looked over the timber and the lumber at the Donlan & Henderson plant when I was there, and am familiar with the general character of it. From my experience as a lumberman I don't believe it would be physically possible to obtain these percentages of grades from a milling of timber such as was at the Donlan & Henderson company. What it would produce in percentages would depend to some extent on how carefully it was manufactured and taken care of; I believe the common average where a mill turns a portion of their product into dimensions would be substantially 12 to 15% of selects, about 10% shop, which they are manufacturing at that point, about 20% #1 and #2 common, about 30% #3 common, and about 10% #4 common, and probably about 15% of dimension.

Cross-examination by Mr. PARSONS.

I am 33 years old and have been connected with

(Testimony of Thomas S. Dennis.)

this firm since its inception in January, 1920. From the present back I have had 16 years' experience in the lumber business. Nine years of that has been in the practical purchase of lumber, the last few years principally confined to the southern field. I have been purchasing for different companies I represented during that period. I know what a purchaser is, and I know what an order is, and what a buyer is. As to knowing the difference between a seller and a vendor and a vendee and a purchaser, I have never given consideration to the terms vendor and vendee [197—91] until recently. Our purchases prior to our operations in the west were all single car lots of small amounts in certain cars. I have never heard in a particular way of the words vendor and vendee in my experience; I have heard the terms; I have never given any consideration to what they conveyed to my mind. It was shown me probably but forgotten after I heard it. I know what the passing of title means; I knew all the time what the word purchaser naturally meant, and what "price paid" meant. I don't think I ever heard the term "vendor's lien" until just recently; I have heard of liens on lumbering; I never heard of any particular kind, just the term lien, or mechanic's lien, which is common in the retail business.

I had met Mr. Donlan several times previous to coming out here; in a business way he was a stranger to me; so was Mr. Henderson; I judge

(Testimony of Thomas S. Dennis.)

that I dealt with him the same as I would with any other stranger; I looked after my interests and expected them to look after theirs. The first proposition Mr. Donlan made was not to sell us the entire output there, all the lumber manufactured and piled and thereafter to be manufactured and piled, at a flat rate of \$42 a thousand; nothing of that kind said at all to my knowledge. I didn't make any offer of purchase for this property at all in our prior negotiations. We purchased two lumber yards up to that time, both in January, and one in August, after that.

Prior to the signing of the instrument we were in a room in the Palace Hotel when we were talking over these terms. He offered the contract to us on the basis of the July, 1919, basis price list; that is, he offered to sell it to us. That July, 1919, price would vary from \$42 depending somewhat on the percentage of grades. Such grades as I find here in the bill of particulars the 2,000,000 feet figures on the July, 1919, [198—92] list, \$35.50 or \$37.50, I should say. After we refused to buy outright we talked over our commission basis and the people we were going to sell it to; and we talked about the insurance feature of it. I suppose the fact is I went over every part and parcel of that contract and every aspect of it very thoroughly from my point of view, and he from his. His suggestion for the next morning was to go to his lawyer. I don't recall that he mentioned his name. He did not tell me that he knew a



(Testimony of Thomas S. Dennis.)

lawyer here who gave those matters consideration, had done a little work for him in the past and that I had better go up and give it to him; he asked me if I had a lawyer to take the matter to and I told him I was not familiar with the lawyers here. I felt that I knew about writing these contracts myself, what few we had made. I had written them out and I told Mr. Violette, who prepared this contract, that I, myself, had been in the habit of making what we had made of these contracts. I did not make a draft in lead pencil of the proposed contract; Mr. Donlan and I both discussed the terms of our agreement; my recollection is that Mr. Violette sat there and took it all down. Then Mr. Donlan and I left.

I am not certain that I came back before the contract was completed; it was completed that day. I am not certain that I read over the portion that Mr. Violette had completed in typewriting and returned the second time for the completion of the contract. There was no suggestion whatever made of vendor's lien; it is not a fact that I was very insistent that the words vendor and vendee be used. As to insisting that the words buyers and purchasers be used, I made no suggestions regarding the language or wording of the contract. I wasn't particularly insistent that it should be a sale. I made the stipulation that the title and possession should pass to us as security for [199—93] the money we were to advance. I don't recall whether I insisted in

(Testimony of Thomas S. Dennis.)

this instrument that it was as security; if I didn't do that I don't know why I didn't. As to the suggestion of the vendor's lien coming from Mr. Violette there was no suggestion of any kind from any of us in regard to the wording of the contract. Either Mr. Donlan or Mr. Violette suggested that in passing title to us they were relinquishing their rights and some provision should be made to protect their still interest in the lumber; I don't recall the words used in that respect.

After the contract was written I read it; I understood the general intent of it. As I expressed it yesterday it seemed to cover the case exactly. What I intended to say was that the contract apparently expressed clearly what each of us was to do. I knew distinctly I had not bought it. I had no intention of fooling the public by taking it under those circumstances. I didn't ask that the contract state that I was the vendee; I required the contract should show that the title passed to us because we were lending money on the lumber and we wanted some security for the protection against that loan. I think I made some remark complimenting Mr. Violette very highly in drafting the contract; I don't recall whether I told him it was exactly what I wanted; I made no remark about it covering the situation at all. After Mr. Donlan and I read it over then Mr. Henderson came in, and it is my recollection that he read it over; then we all signed it. I don't believe Mr. Donlan signed it; I think

(Testimony of Thomas S. Dennis.)

Mr. Henderson signed for his company; there was some explanation that Mr. Donlan had agreed that Mr. Henderson sign all these mill operations.

Subsequent to signing it I went out to the mill. My recollection is that when I got to the mill I found that Mr. Henderson had not completed his deal with Smead. As to whether [200—94] the Smead deal was completed and the insurance taken out on the 15th of April, before we signed the contract, I have no knowledge of when the insurance was taken out; I know for some little time after Mr. Donlan and I had signed the contract there was a dispute between Mr. Donlan and Mr. Smead as to the exact inventory, and it was necessary for them to agree on someone to inventory the lumber before they could ship any of it out. I am not certain that I paid the money or drew the drafts of the 15th, the day before I signed the contract; I don't think it is true but it may be; I doubt if the drafts are dated on the 15th; I think the contract was signed on the 16th.

After I signed this contract I was out to the mill talking to Mr. Henderson. I don't recall whether I had this paint brought out at that time or the time we had some lettering out there. I don't recall any conversation where Henderson said to me, "I would like to get enough of this lumber to build my camps; otherwise I will have to saw it," and I said to him, "Well, if you want any of that lumber you will have to take it out before it is stencilled." I don't at all recall that

(Testimony of Thomas S. Dennis.)

it happened. I didn't have a little conversation about the contract there and Henderson looked at section 8 of it and said that he hadn't understood before to-day how my construction was on that. He never at any time said that. That controversy was in the latter part of September; I know he didn't refer to the contract at that time; he referred to the statement I gave him showing that we charged him \$5 a thousand for the insurance, and then made that remark. I said, "If you have read your contract you certainly must be familiar with that clause."

When I went home I took the contract back; I don't recall that the company saw it; I was in Chicago and I don't know if they gave any thought to it. As far as I know the contract expressed [201—95] what Donlan & Henderson were to do; I am not at all familiar with what might have actuated their wishes in regard to it. In other words, I don't know whether there was any mistake on their part or not. My testimony is that I didn't understand the legal wording of it; as to whether I understood the legal effect of it, I understood it set up what we were each to do, and as far as that was concerned it seemed to cover it entirely.

I had nothing whatever to do with drafting of the contract, Exhibit "P," affirming the contract and the words referring to ourselves as the vendees and the parties as vendors and vendees. To the best of my knowledge our agent, Mr. Juneau, had

(Testimony of Thomas S. Dennis.)

that done in behalf of our firm, as agent; he had authority to do that; he did not have authority and represent us here for all purposes; he represented us in all our transactions except financial transactions; he was the agent of the corporation. As to whether there is any complaint that Mr. Juneau made a mistake in our behalf in speaking of purchaser and vendor and vendee in the same contract, I don't recall if the supplemental contract has anything to do with vendor and vendee. It was not intended that this would modify the original contract whatever; simply to cover the method by which our additional loan was to be paid.

I have no particular complaint about the contract; I am simply surprised at the impression that is trying to be placed on it, the impression that plaintiffs' counsel are seeking to put on it. That is the only complaint I have of the contract as far as I know. As to whether, so far as I know, Mr. Violette didn't make any mistake, I have no idea where he got his words; we didn't discuss them; I don't know that he made a mistake; I don't know whether he said it deliberately, or some other motive. I haven't given any serious thought to whether it was trying to [202—96] get the best of us.

On November 4th, 1920, the plaintiffs owed us, including the advance we made after the fire, approximately \$54,000. The insurance which they collected amounted to \$130,000. I did not demand



(Testimony of Thomas S. Dennis.)

all of that insurance at any time. The letter dated November 4th, 1920, to Donlan & Henderson, Plaintiffs' Exhibit 11, seems to be mine. In that letter I didn't demand the insurance of \$130,000. Explaining why I say "all of the insurance," and I knew that both policies were outstanding, I will say that when I was in Missoula the latter part of September, and Mr. Donlan paid to me through his banker, the \$60,000 of insurance money, it was agreed and understood that there was still a balance due on the advance made up to and including the date of the fire, and Mr. Donlan told me he was going to give me this \$60,000 of the \$70,000 that he had collected then, and the balance would be paid to me when they collected the balance of the insurance money; when I went to Pablo and had my understanding with Mr. Henderson there as to our accounts, showing that, after deducting the \$60,000 that they had paid us, they still owed us some \$36,000, without anticipating our September first advance, Mr. Henderson also assured me that when the balance of the insurance money arrived they would pay me the balance of that insurance. When I refer to the insurance it is very apparent that I refer to the balance of the insurance, and all the balance of the insurance which had not then been collected. Perhaps I did not say so absolutely, but it is hardly likely that I would be asking for something which had already been collected; I was demanding the balance they owed us, to include our amount.

Plaintiff's Exhibit 11, then admitted in evidence without objection, is a letter from [203—97] the defendant company to Donlan & Henderson, dated November 4, 1920, reading as follows:

**Plaintiffs' Exhibit No. 11.**

Gentlemen:

We took the liberty of writing you again by day message as per copy enclosed, asking that you wire at our expense reference to the insurance remittances.

We would not do this, except that the situation is becoming very urgent and serious with us as we have a note coming due at the bank to-morrow for \$25,000.00 which we have arranged to take up, anticipating that we would have all of the insurance money in our possession by this time as the writer was given assurances when in Spokane by the Inter-Insurance Exchange that all of these funds would be in your possession before October 28th.

We wired them after receiving your wire several days ago stating that the check had not yet been received, and have their reply that the check went forward last Tuesday week as they had previously stated. It has occurred to us that the check was delayed enroute and we are very hopeful that in the meantime you have received it and forwarded it on to us as we will be seriously embarrassed if this does not arrive in time for us to take up our note to-morrow.

Please pardon our insistence in regard to this situation but we cannot impress upon you how

(Testimony of Thomas S. Dennis.)

stringent in the financial situation at present in the middle-west and it is all that we can do to take care of our contract obligations at this time, even where we can get prompt returns on our obligations. In addition to this, we have a great many past due accounts which we are forced to carry with the dealers as they are carrying their customers for past due accounts and the banks of course are not in any shape to help them out of their difficulty. [204—98] Trusting that you will appreciate the situation and will do everything that you can to help us get quick returns on this insurance money and thanking you in advance for same, we beg to remain,

By the WITNESS.—After that we did not advertise it extensively over the country that this was our property. “The Retail Lumberman” which counsel exhibits isn’t the one I enclosed in that letter to Donlan & Henderson; I am not certain whether I sent two; it is quite possible we did; I won’t deny that I sent that; it is very likely we did. This is a picture in “The Retail Lumberman” which shows my picture and Mr. Henderson and gang. It is preposterous to think that we owned the plant; this is an advertisement we were publishing to help sell this lumber; we hardly meant to impress that we owned the plant. People would probably have bought it as quickly from Donlan & Henderson as from us. We advertised the entire operation, however, as ours.

(Testimony of Thomas S. Dennis.)

Plaintiffs' Exhibit 12, then admitted in evidence without objection, is an advertisement in "The Retail Lumberman," containing at the top three cuts under which respectively appears "A Montana Forest Monarch—Soft Western White Pine that commands admiration," "5/4 x 26 Clear Air-drying our thick wide 'Clears' in the high, dry altitude of Montana," and "6/4 x 24 Clear A Random Selection from Our Stock of 'Clears' at our Pablo, Mont., plant." Below the cuts:

**Plaintiffs' Exhibit No. 12.**

**THE BEST EVIDENCE!**

**WESTERN WHITE PINE.**

Thick, Wide "Clears" at Pablo, Montana.  
Complete Stocks of Yard and Factory Material to  
Suit Your Requirements.

[205—99]

High, dry altitude, soft textured, well manufactured fine quality stock and first class mill work will Help You to Make Sales and Please Your Customers.

TURNER, DENNIS & LOWRY LUMBER CO.

Member Yellow  
Pine Whole-  
salers Associa-  
tion.

—White Pine Specialists—

Executive, Administrative and  
Sales Offices

American  
Wholesale  
Lumber  
Association  
Efficient  
Distribution

1017 to 1031 New York Life Building

Kansas City, Mo.

(In pencil on margin: June 10th.)

By the WITNESS.—It is not correct that the oral contract I had with Mr. Donlan before it was

(Testimony of Thomas S. Dennis.)

reduced to writing was this: that I told him that there was a little bit of uncertainty about the market, and that if we had a runaway market I was afraid of a trip, and rather than buy I wanted my profit to be certain and that I would take it and buy it and the way I would pay for it was that he must take the risk of the market with me, that I would charge as my profit, to purchasers, 15%, and whether it was a runaway market or a steady market or a reduced market, I would make my payments according to the highest market price that I could get. We took possession of the lumber, then sent our man Juneau here. It is not true that from the 16th day of April, the day of the written contract, until the 3d day of August, we got orders for only three cars. We had innumerable orders for cars at that time; they weren't sent on to Donlan & Henderson because they advised us they were not ready to take on orders; I think I have submitted several letters to that effect. It is not a fact that out of the 11 cars shipped to and including the 3d day of August, 8 were transit cars; there were 10 shipped of which 4 were transit cars. Four of the cars were sent out as rollers and before they landed at [206—100] their destination we expected to sell them. charged a 2% cash discount probably amounting to \$150 or \$200 in the aggregate. We made reports of sale to Donlan & Henderson as soon as the sale was consummated; the period varied depending on how soon the car sold. We sent them invoices as soon as the



(Testimony of Thomas S. Dennis.)

car was sold. I would say that the total amount of the demurrage we charged to Donlan & Henderson was somewhere around \$400. Counsel summing it up on three cars, totaling \$601, and asking where I find anything in the contract that justifies me in charging demurrage to the plaintiffs, I will say that was discussed at the time the suggestion was made that some of the cars to be sold were transit cars; that suggestion was made by myself, and the method of assessing demurrage and penalty charges was explained by me as part of the transit car business; there was no agreement as to that \$601; it was generally understood in the conversation with Donlan & Henderson that any expense of car service incidental to making sale of those cars would be charged to them. I testified that we had such an oral contract—I say, oral discussion at which this feature was discussed. They agreed to leave the marketing of this lumber entirely to our good judgment as they indicated in several of their letters; they indicated to us they agreed to do that under the contract, but we gave them the preference of determining where and when they would sell. As to whether there was any agreement between us that they would stand this charge of demurrage, prior to this instance we discussed it fully, and they assented that we put the lumber in transit, knowing that there was always a charge or a possible contingency. I charged it to them in line with my conversation with them of that; that would be true as to the matter of

(Testimony of Thomas S. Dennis.)

reconsignment; that is a similar charge. That amounts to \$32. [207—101]

The excess freight I did not include in the demurrage. We never received any of those refunds yet because Donlan & Henderson did not send back the expense bills; that can be collected at any time these expense bills are presented to the railroads. Those amount to approximately \$199.99.

The lumber we bought from McKenzie Brothers at Hot Springs was western pine—yellow pine; there is no white pine sawn in this country; it is customary to call the yellow pine grown here western white pine; what we got from McKenzie Brothers was just the same. There was very little larch in it, an occasional tree, and I think no fir at all. As to the character of the cut, it all went into #1 common and also the 5/8ths shop. There were several mills from January to August we were handling cuts, several of these on a commission basis. As to the Beresford stock we got in Idaho, we bought several million feet of miscellaneous wood there—approximately 2,000,000 feet of western pine in that cut, I think. We gave \$27.50 for the white pine; we paid different prices at different places. The white pine in Spokane was the same as Beresford's we bought some larch and fir but paid a lower price; it was practically all segregated and practically all was in pile at that time. I don't know what percentage there was of fir and larch; there was no larch whatever in any I described; that million and a half we bought from

(Testimony of Thomas S. Dennis.)

them was all western pine; we bought probably the same amount of fir and larch at a lower price.

Mr. Donlan paid me the \$60,000 of insurance the latter part of September; at that time the notes we sued on in this case had not already been paid; he did not tell me to apply the \$60,000 on these notes; he told me to apply it on the debit balance due us. He did not tell me to apply it on the notes and I did not tell him I would and that I would deliver him the [208—102] the next day the notes. I told him that I had the notes with me and that I would deliver them to Mr. Henderson when they were paid. I did not tell him at that time that I would deliver the notes to Mr. Henderson when I went up to Pablo. Mr. Henderson asked me for the notes up there that day. I don't know whether he asked me on the ground that Mr. Donlan had told him the notes were paid; he didn't state what the reasons were. This demand of his came up after the bookkeeper and I had gone over the books and I made out this statement for \$36,000 and wanted him to accept; he accepted it rather quickly. I was not very much incensed because the bookkeeper wouldn't accept this statement of mine. I did not, after Mr. Henderson had turned that statement of mine down, Exhibit 1 of the defendant, go to the bookkeeper, Rapp, and say, giving him either the original or the copy, "Here is a record for you; enter this in your books." Nor did I say anything of the kind. It is not true that after Mr. Henderson came back he

(Testimony of Thomas S. Dennis.)

demanded the notes and I reached down in my grip or bag and pulled them out and said, "I will give you these when you pay the rest you owe us"; what I told him was that when the balance due us as established by the statement was paid us, we would relinquish the notes; there was no antagonism at that time; we were on very friendly terms. I didn't take the notes out and shake them at him; I'm not accustomed to doing business that way; I wouldn't be guilty of anything like that. The notes have never been delivered to this day; they are still in our possession.

Mr. Donlan said, with reference to making the application of that \$60,000 at the time he gave it to me, to apply it against the balance they owed us; I don't recall his words. As to speaking of an over-account, or of advances, or of notes, my recollection is that he referred to it only as balance due us. [209—103] Apply it on the balance due, is my recollection. Part of the loans we made to Donlan & Henderson were represented by notes, and part by their bills of sale. The bill of sale did not pay off the obligation instead of securing it; they were simply given as security for the money we loaned on the lumber; that was our understanding, certainly. I don't recollect that we ever wrote Donlan & Henderson to say those bills of sale were security. I am not certain that we ever communicated with them, either orally or in writing after the execution of the contract, Plaintiffs' Exhibit 1, and use the word security with reference

(Testimony of Thomas S. Dennis.)

either to the contract or the bill of sale. We got these bills of sale and Mr. Juneau, our agent, had them recorded at the county seat of Flathead County, where the lumber was located at that time.

As to our allegation in the complaint that Henderson and I agreed upon a balance of \$36,000 due us, for which there is an account stated, the account being represented by our Exhibit 1, Mr. Henderson agreed to that being accurate to this extent, when I handed it to him he took no exception to it other than the exception to the insurance, after which I explained that to him and he withdrew that exception. We made it out jointly, his bookkeeper and I, after comparing and going over the records, and I think the suggestion was made either by Mr. Henderson or myself that it was subject to minor changes, after we had an opportunity to make a complete auditing. There was no agreement with Mr. Henderson in regard to that other than I stated that was our account, as Mr. Rapp and I developed it. There was no formal agreement, his bookkeeper and I had gotten out this statement and I handed it to him; the only reference he at that time made was in regard to some insurance and the fact that he promised to pay the balance when he got the rest [210—104] of the insurance, evidently establishing the fact that he thought that was substantially correct. I don't think he said that this \$36,000 was due us.

Redirect Examination by Mr. POPE.

In computing and making up that statement



(Testimony of Thomas S. Dennis.)

referred to in the exhibit I have just been testifying about, the advances made subsequent to the fire were not considered at all; that is simply a statement of our account, including all transactions, based on the lumber on which we had advances up to the fire.

Recross-examination by Mr. PARSONS.

As to whether I want the Court to understand that we advanced and owned in the neighborhood of a hundred thousand, I will let that question go until I complete the statement.

Witness excused.

**Testimony of Albert Richard West, for Defendant.**

ALBERT RICHARD WEST, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. TURPIN.

My name is Albert Richard West; I live at Spokane, Washington, and I am in the wholesale lumber business. I go out and buy lumber from the mills through Washington and Montana, and dispose of it. Besides our own firm, I buy for W. M. Crombie, New York City, and E. H. LeMay, Montreal export; we also do a domestic business in the far east. I have been in the business and buying in this Montana market 12 years, and am familiar with the market in this district on Montana and Washington, for the mill runs of lumber. By mill run is meant where you buy a cut of lumber taking

(Testimony of Albert Richard West.)

it as it come from the mill, [211—105] either piled up at the mill or f. o. b. the mill.

I know what was the general range of prices for mill runs during the year 1920; it depends entirely on the timber but all the way from \$22.00 up to \$30.00. I know of two sales or three that were made; Mr. Dennis has already related our sale. We sold them a million and a half on Priest River on a basis of \$30.50, f. o. b. cars; this was dressed. I know of one or two sales in Spokane where the stock was hauled in by auto truck, piled in the yard, on the basis of \$30; that was along in July or August. The price hauled in by auto truck would be higher than it would be at the mill. I hardly believe there would be any substantial difference in the market where this was done and Pablo, and loaded in this neighborhood. The highest price I have known to be paid for cut in July and August and September, 1920, was \$30.50. As to the grades included in that, the #4 was practically all out, and we had a small percentage of the #3 that we had already disposed of then. It left almost a #2 and better grade, with a small percentage of 3.

I bought other lumber in 1920; I made several contracts in a range of 50, 75 and 100 miles from Spokane, one in particular with B. L. Wilson Lumber Company, at Cusick, Washington, about 75 miles from Spokane. This was western pine, partly mixed; we bought about 3,000,000 feet of western pine. We bought that in the yard rough

(Testimony of Albert Richard West.)

on the basis of \$28. That was in March and we had to do the milling of that lumber, which would run around \$4 a thousand; later when the conditions got so badly demoralized the B. L. Wilson Company came to us and voluntarily reduced our contract \$2 a thousand, to \$26. They did that along the latter part of August or the fore part of September. [212—106]

In January and the fore part of February we had what is termed a runaway market, and along the latter part of February or the fore part of March when the Weyerhauser Sales put in their reduced prices and cut 30% it brought business almost to a standstill, and from that time on the market has been growing worse all the time. Unless one was located suitable to a box factory they had business for, there would be practically no market in July, August and September, for 3,000,000 feet of lumber at the mill; box factories had a little business over in our district; it was their apple box season. In January it was a runaway market, strong; that started to drop in February, and kept droppng to the present time; it is badly demoralized. After April and May, 1920, we couldn't market 3,000,000 feet of lumber at the mill very quickly; in the first place there was no demand to speak of and what little demand there was was practically in mixed cars, where the dealer wanted 50, 75 or maybe 100 items. The quotations of lumber didn't mean that you could load and sell any amount of lumber you had at that quotation; they

(Testimony of Albert Richard West.)

would send a quotation for possibly one or two cars, giving you a list of just what they wanted; we couldn't sell any large bulks of stock at that time. That condition existed from along the latter part of March or the fore part of April up to the balance of the year. I don't think in July, August and September 3,000,000 feet of western pine could have been sold unless, as I said, the mill happened to be located near a box factory that had some favorable apple box business; in that event I would say from \$28 to \$30 could be procured for it. You couldn't go out and sell the bulk of this lumber on ordinary sale, if you were not situated near a box factory or an apple orchard or something of that kind, and you had them to dispose of it to. You couldn't sell it at that time; [213—107] it was impossible. We couldn't get any price for it, because we had been trying to sell some right along; there didn't seem to be any demand. I would say the range of the market from August first on down to the end of 1920 was around \$12 to \$15 a thousand, average.

Cross-examination by Mr. PARSONS.

I have known Mr. Dennis about three years. I have bought some lumber for Turner, Dennis & Lowry at times; I am not on the payroll at this time. I am interested in some mills manufacturing lumber. I am interested in the Donovan Hopka Ninneman Company at Hope, Idaho, and have been for about three years; also in the B. L. Wilson Lumber Company at Cusick. The Wilsons cut at Cu-

(Testimony of Albert Richard West.)

sick about 50 or 60 thousand a day; the Donovan, Hopka Ninneman cut at Hope about 25 to 30 thousand. That measured about 10 to 12 million at Cusick operation, and one to two million at the Hope operation. We own no lumber yards ourselves; I am what they call a "scalper"; that is, a broker; that is, I get lumber where I can get it cheapest for some customer.

I say it was impossible to sell this 3,000,000 feet of lumber after July, 1920. I sold a million and a half to these very people in August, but I meant on the market, to go out and get orders for it. I was working all the time to get orders on the market. I stayed around Spokane; we had twelve or fifteen connections out through the territory trying to sell lumber. I was out in March; that was the time of the runaway market.

There were three or four of us interested in parts of the cut on Priest River; there was no litigation involved in the matter; we couldn't get cars; we only had limited planing-mill facilities, and I took it up with Mr. Dennis to see if he wouldn't purchase our interests up there, feeling that it was [214—108] for the best of all concerned. He purchased it; he took the pile, good, bad and all, for \$30.50. As I said, we had shipped practically all of the #4, and the greater part of the #3 out of that, left it almost cut to #2 and better, with a small percentage of 3.

Witness excused.



**Testimony of G. H. Lowry, for Defendant.**

G. H. LOWRY, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is G. H. Lowry; I am president of the defendant company, and have held that office ever since its organization in January, 1920; prior to that time I was in the lumber business since 1898. I came to Montana in connection with the Donlan & Henderson matter in November, 1920. I got here from Polson on Sunday afternoon about four o'clock, on or about the 20th of November; I was in Pablo before I came to Missoula, and saw Mr. Henderson at Pablo. On Saturday Mr. Juneau and I went out to the mill near Pablo and met Mr. Henderson there, and then we went back to Polson and stayed there that night and came down on the train leaving Polson about noon on Sunday, and Mr. Henderson and Mr. Keith, his auditor, got on the same train at Pablo, and we all came down together. When I came to Missoula I did not find Mr. Donlan.

The purpose of my coming here, they had received advice that the balance of the insurance checks would be here on the Monday following the Sunday when we arrived, and I came down for the purpose of endorsing these insurance checks and receiving approximately the \$35,000, due us from Donlan & Henderson out of these insurance checks. On Monday we went over to the [215—109] bank and Mr. Henderson made inquiry and was advised that

(Testimony of G. H. Lowry.)

the remittance had not been received. I think Mr. Donlan got in some time that evening or early night. Tuesday morning, perhaps the middle of the forenoon, I received a telephone call at the hotel from Mr. Henderson to come down to an office which he described, and Mr. Juneau and I went down there; it was in the Western Montana Bank Building, or something of that sort. I found Mr. Donlan, Mr. Henderson, Mr. Keith and Mr. Violette there; that was at Mr. Violette's office. Mr. Henderson started the discussion with reference to our contract in settlement, that they didn't construe this contract as allowing us \$5, a thousand above our advances. I told Mr. Henderson that it seemed strange to me that no exception had been taken until now, to the statement which Mr. Dennis had left with them something like two months before; that perhaps I had better go back home and send Mr. Dennis out to make the settlement; and then I explained to them there that we had loaned them approximately \$100,000, or 40% of our capital, which they had the use of the greater part of the year, and it seemed only reasonable in case we were defeated in getting our commission for handling the lumber that we should have some compensation for making a hole like that in our year's business, and we thought that was perfectly reasonable. The reply to that was that they had paid us interest; I told them if we wanted to loan money we could stay at home and do that; that the purpose of making our loans to mills was to promote our lumber business and make a profit

(Testimony of G. H. Lowry.)

on the lumber because we were borrowers of the banks ourselves and paying interest and we were not ahead anything on the interest, and also we had quite a considerable expense in maintaining men to go around the mills and check up the lumber. We got nowhere in that discussion. We made no agreement on arbitration. [216—110] Mr. Keith said Dennis' statement which he had given to Mr. Henderson a couple of months before at Pablo had not made proper allowance for stoppage of interest on account of the ten or twelve cars which had been shipped out; in Mr. Dennis' statement of that he had computed interest on the total amount loaned them up to the period when he was there and they had credits against the interest and allowance of \$83, as I remember, for the stoppage of interest, dating back to the dates of the shipments of these cars; of course, they were entitled to stop payment of interest as soon as they made shipments out under the contract. I had proposed that we would take our money back if they wanted to pay us; that we wouldn't and didn't want an operation that did not provide in the contract that provision in clause 8 for protection to us in case of fire; that, of course, we would not renew the contract the first of January for another year; under no circumstances would we enter into a contract without that provision, which they said they would not allow; that under the circumstances the sale of any of the lumber accumulating after the first and up to the first of the year should not be given to us, as un-

(Testimony of G. H. Lowry.)

doubtedly they would prefer to have a single operation with someone else for 1921, including what lumber they had on hand, rather than have us handle a million or two million feet at \$20 a thousand and then have someone else handle the balance. Mr. Donlan had said he would consider that. We then adjourned to meet that afternoon, for Mr. Donlan to consider my proposition, and pay us up and we would withdraw from the operation and release the lumber, and also Mr. Keith to compute this interest allowance to them.

We did not meet at two o'clock again. In the meantime, Mr. Henderson called me up at the hotel and told me that Mr. [217—111] Keith would be unable to have his figures by the time set, and I don't know whether he set another time then or said he would call up later. Mr. Donlan did not appear at that time. I found later that he had gone somewhere else. Later in the day Mr. Henderson called up to say that Mr. Keith hadn't got his figures completed, and finally Mr. Henderson and Mr. Keith and an attorney—I believe Mr. Violette, came to my room at the hotel about eight o'clock in the evening; it was then that I learned that Mr. Donlan had gone out to his logging operations. When they came up to the room, Mr. Henderson brought the statement which Mr. Keith had been working on, and which proved to be a statement of account rather than a computation of this presumed error in the interest. That statement was Defendant's Exhibit "E," handed me by Mr. Hen-

(Testimony of G. H. Lowry.)

derson. He told me that Mr. Donlan had gone out to his logging operations and I took exception to his having gone away when we had an appointment with him, and he said that Mr. Donlan had understood that I was going to go back home and send Mr. Dennis out to make this statement.

I raised the question that he had not figured any interest at all; there wasn't interest charged to them of some \$2,300 or \$2,400, which he had not shown as credited on this, and we discussed the question of \$14,000 charged to us against the advance which was due them on their September cut. That was satisfactory; that was the last item on the list, 699,972 feet, November finished piles, \$13,999.-44; that was the amount of the November allowance on the cut made during October or up to the date of the inventory that was taken. The other advances made in September were not included in this statement. Charging that \$13,999 against us, the statement shows a balance due us of a little over \$1,000. I furnished them a statement later making some corrections of their figures on this, both in the proceeds [218—112] which they attempted to estimate of the cars shipped, and also of the interest which they failed to include at all. Defendant's Exhibit 13 is a carbon copy of a letter which I dictated in Spokane, and sent the original by Mr. Juneau to Mr. Henderson, at Pablo. Accompanying that I sent the statement which I have just referred to, correcting the statement of Mr. Keith as to the interest.



(Testimony of G. H. Lowry.)

The hour of twelve o'clock, noon, having arrived, court was in recess until 1:30 P. M., at which time the trial was resumed, the witness G. H. Lowry resuming the stand.

By the WITNESS.—Defendant's Exhibits 14 and 15 are the letter and the statement so transmitted by me to Donlan & Henderson. That's the original letter with my signature; that is a carbon copy of the statement rendered, and both of these were given by me to Mr. Juneau in Spokane, with instructions to deliver them to Mr. Henderson at the mill. This was not in the nature of a compromise offer of the difficulties existing between us.

Defendant's Exhibit 14, then admitted in evidence, is a letter from the defendant company, signed by "G. H. Lowry, Pr.," to Donlan & Henderson, dated at Spokane, Wash., December 7, 1920, reading as follows:

**Defendant's Exhibit No. 14.**

Gentlemen:

I have waited here for further advice from you in accordance with Mr. Donlan's wires, reading, November 27, "In conference with parties. Will wire later tonight or in the morning," and November 28, "Parties are to let me know definitely Thursday."

I wired Mr. Donlan Friday night, December 3d, after trying [219—113] to reach him by 'phone.

I have just talked with Mr. Donlan by 'phone and he advises his parties put him off from Thursday to

Saturday, and from Saturday to Monday, but had not heard from them up to noon today.

Mr. Donlan desired that Mr. Juneau proceed to make usual December estimate, and he will leave here to-night for the purpose.

Herewith please find statement, subject to correction if any error has occurred, showing balance due us on your notes of \$4,416.60 to be deducted from amount due you on December advance.

The \$7,055.18 is the amount wired me from the office as proceeds due you on all cars which have been closed. Detailed account of each car is being sent you from Kansas City. There will remain due you, balance above \$20.00 per M ft. on cars 78564 and 56461 and these balances with usual detailed statement of sale will go forward to you as each car is closed.

I understand we have at Kansas City Insurance policies for only \$20,000.00 against advances. Please give to Mr. Juneau additional policies to cover the 1,615,786 ft. covered by previous advances plus whatever the December advance covers.

On basis of this statement, when the \$4,416.60 balance due on notes is taken into account on the December advance, all of your notes will stand paid and will be sent from Kansas City to you at once. Also the November 4th advance having been paid to you by credit on your notes, the draft which Mr. Juneau gave you for \$13,999.44 stands cancelled. Please therefore give it to Mr. Juneau.

I have taken Mr. Dennis' figures of October 4th for credit of \$83.22 interest refund to *you* account shipments. Mr. Keith said we had not given proper allowance on interest, but did not make any mention or correction of it on his statement. However, this is simply computation, and correct figures will of [220—114] course be used. Any error of any description in enclosed statement will be corrected.

We are endeavoring to get an order for the

\* \* \*

Defendant's Exhibit 15, then admitted in evidence, is as follows:

### Defendant's Exhibit No. 15.

#### DONLAN AND HENDERSON ACCOUNT

Any errors or omissions will be corrected:

1920	Debit
4/15 Notes (\$40000) (\$10000) (\$10000) .....	\$60,000.00
6/28 Notes (\$6082.24) (\$5000.00) .....	11,082.24
6/28 Advance .....	8,917.76
8/14 Advance .....	4,466.36
10/4 Int. \$60,000 4/15 to 10/4 @ 7% 5 M. 19 days.....	1,971.65
10/4 Int. 11,082.24 6/28 to 10/4 @ 8% 3 M. 6 days.....	236.41
10/4 Int. 8,917.76 6/28 to 10/4 @ 7% 3 M. 6 days.....	166.46
10/4 Int. 4,466.36 8/3 to 10/4 @ 7% 2 M.....	52.10
	<hr/> 86,892.98
10/4 Cr. per Attached statement.....	68,618.40
	<hr/> 18,274.58
10/4 Due T. D. & L.....	18,274.58
11/4 Int. 10/4 to 11/4 (11082.00 @ 8%.....	9.23
(Bal. @ 7%.....	106.60
	<hr/> 18,390.41
11/4 Less advance of 11/4 on lumber.....	13,999.44
	<hr/> 4,390.97
12/4 Int. one month 7%.....	25.63
	<hr/> 4,416.60
12/4 Due T. D. & L. Lbr. Co.....	4,416.60

(Testimony of G. H. Lowry.)

Advances

Sept. 2 10289.98

Sept. 30 8026.30

Nov. 4 13999.44

32315.72

4416.60

\$36732.32 Total

Credit

10/4 Draft ..... 60,000.00

10/4 Refund interest on shipments:

1509.98 7/ 1 to 10/1 26.42

2519.76 7/10 to 10/1 39.20

1651.12 8/ 1 to 10/1 17.60

83.22

10/4 Proceeds of shipments:

Car 78564 shipped not sold about 40000 ft.

@ 20.00 adv..... 800.00

Car 56461 shipped and sold. Final settlement and

frt. bill not received. About 34,000 ft. @ 20.00

adv..... 680.00

Balances on above due and payable to D. & H. as

soon as net proceeds can be ascertained.

Total net proceeds all other cars shipped..... 7,055.18

68,618.40

[221—115]

By the WITNESS.—Following the time when the statement of Mr. Keith was handed to me at the hotel, I saw Mr. Donlan while I was in Missoula; if that conference was on Tuesday I saw him the following day, Wednesday; I met him at Mr. Violette's office. At that time we talked about the suggestion previously made by me that Mr. Donlan pay us what we had advanced and let us retire. I made a proposal to Mr. Donlan which you might call a compromise offer or not to settle the difficulty, that if he would pay us back what they owed us we would release the lumber and retire from this prop-

(Testimony of G. H. Lowry.)

osition; that was never consummated. In regard to that proposition, Mr. Donlan says, as near as I can remember his exact words, "I have wired for money and think I will get it, and I will know by Saturday," and I replied to that that I would go on to Spokane to-night, that I disliked very much to be compelled to come back to Missoula on my return, and he says, "It will not be necessary for you to come back; I will send Mr. Henderson to settle with you, and you will have a telegram from me by four o'clock Saturday." I received such a telegram, delivered by the telegraph company to the hotel and by them to me. Defendant's Exhibit 16 is that telegram.

Defendant's Exhibit 16, then admitted in evidence without objection, is a postal telegram from E. Donlan to G. H. Lowery, Davenport Hotel, Spokane, dated Missoula, Nov. 27, reading: In conference with parties, will wire later to-night or in the morning.

By the WITNESS.—A wire was sent as promised in the preceding telegram, and Defendant's Exhibit 17 is the one that I received. [222—116]

Defendant's Exhibit 17, then admitted in evidence without objection, is a Postal telegram, dated at Missoula, Mont., 28, 1920, from E. Donlan to G. H. Laury, Davenport Hotel, Spokane, Wash., as follows: Parties are to let me know definitely Thursday.

By the WITNESS.—The final outcome of Mr. Donlan's promise to let me know was a telephone conversation with Mr. Donlan about a week later.



(Testimony of G. H. Lowry.)

He had not secured the money he talked about up to the last communication I had with him. I went on west and around to Kansas City, before which I sent through Mr. Juneau the statement I have previously referred to.

There was another inventory made after November of the lumber that was in pile at the mill; that was completed from the 8th to the 10th of December; no advance was made on that account. I had a conversation by telephone with Mr. Henderson about that subject. With respect to how that advance would be made and under what circumstances, in the first, they said, from the amount of the advance would be deducted about \$4,400, balance on uncontroverted matters as per the statement which I had sent them, on consideration, if they received this advance from us, our proposal to accept this referred to our loans to them, and release, the lumber could be withdrawn, and we would not make this December advance and then take our money back, but if they wanted to pay us off and have the lumber released, it must be done on the basis of what they had already obtained then and not any more. I stated in the letter if they elected to make the draft then, our proposal to withdraw would be cancelled; we would not make that good; they never drew on us for the amount of the December advance or any portion thereof. [223—117] Mr. Henderson told me they would defer that matter until Mr. Donlan's negotiations were completed. There was never any request or demand made on us for the advance on

(Testimony of G. H. Lowry.)

the December inventory. The next information I had from them was a telegram from Mr. Parsons that a suit had been filed against us.

I am familiar with certain features of the manufacture and cutting and planing of lumber of the character of this at Donlan & Henderson's plant; I am acquainted with the business of manufacturing lumber; I have had knowledge of that business beginning about 22 or 23 years ago. Lumber graded in the yard as it comes from the mill will grade lower as it comes from the planer for a variety of reasons. In drying lumber, this western pine especially, and some other varieties of lumber, there is more or less stain develops; there is a certain amount of seasoning checking that develops unavoidably; there are some split ends that develop and a certain amount of warping, the boards will curl up and roll down when they go through the planer, and holes come, by the pressure, and that all lowers the grade; in grading lumber there are certain machine defects that are recognized by the grading rules—chipping, it is called, and curls and breaking up of knots and knocking out a piece of a knot. All of those are unavoidable in the process of drying and seasoning lumber.

Cross-examination by Mr. PARSONS.

I never heard of an instance of lumber being graded so that it overruns when put through the mill; it depends on how they grade it. My contention is that on December 8th or at the present time, according to our books and claim, the plaintiffs in

(Testimony of G. H. Lowry.)

this case owe us \$36,732.32, outside of about \$16,000 uncontraverted matter. This statement is approximately correct, [224—118] as far as it went; it didn't take into consideration the matter of \$5 a thousand which Donlan & Henderson refused to recognize, and also these cars that were credited here, I have stated in the letter were subject to revision, as I had simply received a telegraphic advice from the office that this was not to be absolutely right. I have no knowledge at all of the items of \$601 for demurrage and \$199 for excess freight; and I know nothing at all of the deviation of cars, \$5. Our total claim amounts to \$36,732, plus \$16,000 for this \$5 a thousand profit on the lumber, making a total of substantially \$53,000. I assumed that Donlan & Henderson owned this lumber at the mill at the time it was destroyed, in making these figures. 3,338,000 feet of lumber, even at \$25 a thousand, would amount to substantially \$83,450. If it was worth \$50, as a matter of computation, it would be worth way over \$160,000.

As to whether I stated that I thought this account which was delivered to Mr. Rapp or Mr. Henderson about October 1st, 1920, ought to be accepted as true because we had received no repudiation from Mr. Henderson, I will say I told Mr. Henderson, and Mr. Donlan was present, that it seemed strange to me that there was no complaint or objection to this matter until practically 60 days—it was about 60 days. Defendant's Exhibit "E" is the account that was rendered me by Mr. Keith on the 23d day

(Testimony of G. H. Lowry.)

of November, 1920. As to whether I, in writing or otherwise, repudiated this to Mr. Donlan or Mr. Henderson, or either of them, I will say I sent Mr. Henderson my other statement. I called their attention at the meeting in the evening to the fact that these amounts on these cars were wholly immaterial, as the account of sales which we rendered for these cars would show the exact proceeds of the cars. Asked in what regard I repudiated Exhibit "E," I will say I called their attention [225--119] to the fact that they had not computed any interest on it and I raised a question about an item of \$177.80, discount on the drafts. I don't remember any discussion of their statement in here that these notes were paid and their asking us to return them. I don't think counsel's question that because I had not repudiated that for a period of seven months I wish the Court to understand that I accept that as true, should be answered; this suit was filed a short time after that. Asked if I ever repudiated it, I will say I furnished them another statement there. I furnished them, a corrected statement to show that I didn't accept that as true. I don't remember any specific discussion as to whether these notes were not paid or of our never refusing, apparently, to deliver them.

Witness excused.

**Testimony of Louis X. Juneau, for Defendant.**

LOUIS X. JUNEAU, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. TURPIN.

My name is Louis X. Juneau; I live in Spokane; my occupation is lumbering; I am employed by Turner, Dennis & Lowry Lumber Company, and have been so employed for a year and a half. I was acting under the company's instructions, Mr. Dennis in particular. During that time I have been looking over contracts for them, and also any proposed contract submitted to them for consideration. What I mean is to check their tally and inventory the lumber, and watch the grades and manufacturing and shipping; I did that in regard to this lumber at Pablo.

I had conversations with Donlan or Henderson or both of them as to shipment of that lumber, as to when that should be made. Along the first of May I asked if they were ready to [226—120] ship, and Mr. Henderson said, no; he says, "We don't want to start that old slow feed machine; it is too expensive to operate it under the present cost of wages." He said they wanted to wait until they get the fast-feeding machine in. I didn't have a further talk with him until the next trip out there, possibly in June. Then I asked him if they were going to start with any more shipping, and if I remember right I left a loading memorandum list there with them, so that any time they wanted to



(Testimony of Louis X. Juneau.)

start they could load off this memorandum list. They said if they decided to start shipping they would do that. By the machine, I mean the matcher or planer, the one that dressed the lumber. The lumber was rough in the piles and was to be shipped dressed; they didn't want to dress it and load it with this slow machine. I don't know as I had any more conversation after that until along the last of July; they commenced shipping some time in July, if I remember right. They did not have a new machine then, but started up the old machine. I don't know exactly the number of men they had employed there, probably 18 or 20.

I made a tally of the lumber somewhere about the first of each month. I made one in June, July, August, September and so on to the last trip. I have those tally books for June, July and August for all the stock that I have inventoried in the yard, as per grades and pile number and so forth. I have a tally book for June 28th. To get the notations on this Exhibit, Defendant's Exhibit 18, I went through the yard with their representative, Mr. Rapp, and took it off from their piles, as they were marked, numbered, in front of the pile. The grade was indicated on the front of the pile and I wrote it down. This only represents the figures that I found on the piles; they were checked together. [227—121]

I made the next tally in August, but haven't the record here; I think I left that at home; I have looked for that at home, and have not been able to

(Testimony of Louis X. Juneau.)

find the complete tally of that record; all I have is the total amount of the August 3d inventory; it shows just the totals of each kind. I made all the search that I could imagine for the complete tally of August 3d. I didn't make one in July; August 3d is the July, just a continuation of that. The two of them averaged as to grades and quantity about the same. I have figured from these sheets the percentage of the different grades that were in it, and am able to say what the percentage is, as shown by this Defendant's Exhibit 18. They would be 20% 1 and 2, 30% 3, 15% D select and better, 10% shop, 10% #4, 15% dimension.

By Mr. TURPIN.—We offer this Exhibit 18.

By Mr. PARSONS.—I would like to ask a question or two.

By the WITNESS (In response to Mr. PARSONS.)—This instrument that I have here, pages running from 135 to 146, seems to have been torn out of a book; that was another book out of which I used for another purpose; that is the back end of the pages; it was an old book I was using up, and all the rest of the leaves of that book I can bring here; they came loose as they are. I did not make my monthly statement in this loose-leaf way; that was only that one particular old book. The rest of the estimates I commenced using a new book. I have that book. This was made with Mr. Rapp, their representative. We compared all the way through, as we were going through the yard and each kept our own books and our totals agreed.

Defendant's Exhibit 18, then admitted in evidence without objection, as follows:

### Defendant's Exhibit No. 18.

Fletcher Spur., Pablo, Mont., 6/6/20.

### DONLAN & HENDERSON INVENTORY JUNE 6, 1920. [228—122]

Pile	No.		
1	11316	1 x 12—16 #3 6/6	220.56
2	1120	1 x 12—16 #2 5/26	179.20
3	1769	1 x 8—16 #2 6/6	188.69
4		4" to 12—16 #4 5/25	150.40
5		1 x 4—10/16 Set 6/3	118.62
5		Roof Bd.	2.68
6	13	2 x 4—16 casing	1.39
6		1 x 4 10/16 Set 6/6	149.10
6		Roof Bds.	3.88
6	9	2 x 4—16	.96
7		1 x 6—10/6 Set 6/6	143.45
7	10	2 x 4—16	1.07
7		Roof Bds.	3.92
8		1 x 8 10/16 Set 6/3	126.36
8		Roof Bd.	3.42
8	12	2 x 4—16	1.28
8	352	1 x 4—16 cain	18.77
9		4/4 Shop 6/3 6/3	88.48
9		Roof Brd.	3.48
9	232	2 x 4—16 x	24.68
			1430.39
143039 @ \$20			\$ 2860.76

### INVENTORY JUNE 25—20.

Pile			
10	1318	1 x 12—16 #3 6/18	210.88
11	1318	1 x 12—16 #2 6/16	210.88
12	705	1 x 12—16 #2	112.80
13	933	1 x 12—16 #3	149.28
14	721	1 x 10—16 #3	95.80
15	1482	1 x 10—16 #3 6/15	197.34
16	1483	1 x 10—16 #2 6/12	197.47

17	587	1 x 10—16	.....	78.27
18	761	1 x 8—16 #3	.....	81.16
19	1898	1 x 8—16 #3 6/21	.....	202.45
20	1205	1 x 8—16 #2	.....	128.53
21	1735	1 x 8—16 #3 6/8	.....	185.07
22	714	1 x 12—14 #3	.....	99.96
23	511	1 x 12—14 #2	.....	71.55
24	663	1 x 10—14 #3	.....	77.35
25	482	1 x 10—14 #2	.....	56.23
26	1383	1 x 8—14 #3	.....	124.11
27	849	1 x 8—14 #2	.....	79.24
28	474	1 x 12—12 #3	.....	56.88
29	384	1 x 12—12 #2	.....	46.08
30	514	1 x 10—12 #3	.....	51.90
				<hr/>
				2516.83

Pablo, Mont.

DONLAN & HENDERSON INVENTORY JUNE 25—20.

31	410	1 x 10—12 #2	.....	41.00
32	989	1 x 8—12 #3	.....	79.32
33	900	1 x 8—12 #2	.....	72.00
34	80	1 x 12—10 #3	.....	8.00
35	80	1 x 12—10 #2	.....	8.00
36	117	1 x 10—10 #3	.....	9.75
37	79	1 x 10—10 #2	.....	6.58
38	376	1 x 8—10 #3	.....	24.48
39	226	1 x 8—10 #2	.....	13.40
40	28	1 x 12— 8 #3	.....	2.24
41	22	1 x 12— 8 #2	.....	1.76
42	50	1 x 10— 8 #3	.....	3.44
[229—123]				
43	39	1 x 10—8 #2	.....	2.60
44	203	1 x 8—8 #3	.....	10.73
45	83	1 x 8—8 #2	.....	4.43
46		4/4 Shop	.....	95.70
47		4/4 Shop 6/23	.....	121.70
"	21	1 x 12—18 Roof	.....	3.78
"	14	2 x 4—16	.....	1.49
48		#4—16 ft. 230	.....	82.80
49		#4—16 " 6/17	.....	184.00
50		#5—8/20 200	.....	68.90
				<hr/>
				845.20

# 290 Edward Donlan and Ben W. Henderson vs.

51	4" to 12— 8	53	.....	23.85
52	" —10	94	.....	45.12
53	" —12	114 6/16	.....	82.08
54	" —12	.....	.....	10.26
55	" —14	164 6/16	.....	123.00
56	4" to 6— 8	cons 52 6/23	.....	36.92
57	" 12—4/6	30 6/8	.....	24.60
58	" "	30 6/17	.....	25.20
59	" "	30	.....	19.50
60	#4" Bds. 16—	230 6/8	.....	184.00
61	#4 " —16	160	.....	19.20
62	195 1 x 4—10 #2	.....	.....	6.40
63	566 1 x 4—10 #3	.....	.....	18.87
64	314 1 x 6—10 #2	.....	.....	15.70
65	539 1 x 6—10 #3	.....	.....	26.95
66	254 1 x 4—12 #2	.....	.....	10.16
67	766 1 x 4—12 #3	.....	.....	30.64
68	839 1 x 6—12 #2	.....	.....	50.64
69	997 1 x 6—12 #3	.....	.....	59.82
70	224 1 x 4—14 #2	.....	.....	10.52
71	534 1 x 4—14 #3	.....	.....	24.92
72	593 1 x 6—14 #2	.....	.....	27.67
				<hr/>
				875.02

Pablo, Mont., 6/25-20.

DONLAN—HENDERSON.

Pile				
73	930	1 x 6—14 #3	.....	65.10
74	131	1 x 4—16 #2	.....	6.99
75	650	1 x 4—16 #3	.....	34.67
76	1094	1 x 6—16 #2	.....	87.52
77	1856	1 x 6—16 #3	.....	148.48
78		5/4—10/6 Shop 221	.....	81.77
79		5/4 " .....	.....	28.73
80		2 x 4 to 2 x 12 8/16 set 272	.....	70.72
81		4/4 Shop 6/8	.....	130.35
"		Roof .....	.....	3.98
82	429	2 x 12—16 cons	.....	137.28
83	356	2 x 10—16	.....	94.94
84	914	2 x 8—16 6/22	.....	194.99
85	720	2 x 6—16	.....	115.20



*Turner, Dennis & Lowry Lumber Co.*      291

86	95	2 x 12—14	.....	26.60
87	113	2 x 10—14	.....	26.33
88	290	2 x 8—14	.....	54.13
89	175	2 x 6—14	.....	24.50
90	79	2 x 12—12	.....	18.98
91	94	2 x 10—12	.....	18.80
92	192	2 x 8—12	.....	30.72
93	169	2 x 6—12	.....	20.28

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1421.95

[230—124]

94	24	2 x 12—10 cons.	.....	<b>4.80</b>
95		2 x 6—2 x 8 80 818	.....	8.98
96		1 x 4—8/20 Set 6/10	.....	88.38
"		Roof	.....	3.15
97		1 x 4—8/20 Set 6/14	.....	108.12
"		Roof	.....	3.96
98		1 x 6—8/14 Set 6/17	....	110.27
"		Roof	.....	2.31
99		4/4 Shg 6/6	.....	132.00
"		Roof	.....	4.00
100		4/4 Shg.	.....	125.40
"		Roof	.....	4.00
101		1 x 4—8/20 Set	.....	88.40
102		1 x 10—8/16 Set	.....	16.50
103		1 x 8 Set	.....	40.32
104		1 x 6 Set	.....	50.40
105		1 x 8 Set 6/16	.....	102.40
"		Roof	.....	3.80
106		1 x 6—16/20 Set 6/17	.....	161.36
"		Roof	.....	3.80
107		4" to 12" 4/8 Set 43 6/21	.....	31.66
108		4" to 12" 4/8 Set	.....	9.03

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1103.02

Pablo, Mont.

DONLAN & HENDERSON INVENTORY JUNE 25—20.

Pile				
109	144	2 x 4—12 cons.	.....	11.52
110	367	2 x 4—14 "	.....	31.25
111	278	2 x 4—16 "	.....	46.33
112		2 x 4—18/20 18—1368	.....	16.21
		20— 253	.....	

## (Testimony of Louis X. Juneau.)

113	2 x 6—2 x 8	18/20	18½pc.....	52.99
114	2 x 10—2 x 12	18/20	18½ .....	49.95
115	1 x 4 to 1 x 12"	18/20	cons.....	180.05
116	170 2 x 8—16	cons.....		36.25
117	4" to 10"	6/8 Set	6.10 43.....	30.10
118	1 x 10—10/18	Set	6/17 .....	127.05
"	Roof			3.78
119	1 x 12—10/16	Set		81.12
120	1 x 13 and wider	sil	143.....	58.63
				<hr/>
				725.25
Covered Piles 6/25—20				466669.....
Uncovered " "				425107.....
				<hr/>
				891776.....
6092.20	Due	Sept. 1st.....		
5000.00	Due	Oct. 1st.....		
				\$ 8917.76
				6082.24
				<hr/>
				\$15000.00

By the WITNESS.—I remember the circumstances of this last draft for \$13,999, plus that was given to Donlan & Henderson. After I inventoried the yard I drew a draft on the company in the [231—125] amount, and then the \$10 credit on the \$20 advancement, and we were to get a bill of sale for the advancement made on the inventory. I drew the draft and wired the company as to what I had done; I gave the draft to them. After that I got a wire from Mr. Dennis in Kansas City that they had not sent the \$20,000 they agreed to send, and for me to get in touch with Donlan & Henderson at once, which I did. I went and saw Mr. Henderson first, at his mill, and I told him the circumstances; then I asked him why their money hadn't been sent, and by not getting that the drafts might be turned down,

(Testimony of Louis X. Juneau.)

and he said, "Well, I thought I needed the money worse than your people did." And we told him that by not having that money there the drafts might be turned down, and if he would give us authority to wire the office authority to draw on them for the \$20,000. He told me to go and see Mr. Donlan; I drove out in my car that same day and located him out from Arlee, and put the same question up to him. He said, "Well, Ben used that," and I said, "The drafts will be turned down if you don't get it," and I think I showed him the telegram from the office, and he said, "I will meet you to-morrow down at Missoula, and see if I can't arrange it for you to get that money." The next day we did meet in Missoula, and without much progress; that evening he told me to go out and see Jack Keith at the bank, the next morning. That was the last conversation we had.

Defendant's Exhibit 20 is a telegram which I received from Mr. Dennis; as is also Defendant's Exhibit 19. I showed these telegrams to Mr. Donlan.

Defendant's Exhibit 19, then admitted in evidence without objection, is a Western Union telegram, dated Kansas City, Mo., June 26, 1920, addressed to L. X. Juneau, Florence Hotel, Missoula, Mont., reading: [232—126]

#### **Defendant's Exhibit No. 19.**

Have not replied sooner to your wire twenty fifth as uncertain what course to persue would suggest that you advance to them and draw on us for ten dollars per thousand on the total amount of their

inventories taking bill of sale for same and stenciling the piles and marking the tops course of all unfinished piles we will credit their note due July fifteenth with the remaining ten dollars per thousand if they need more than this you may draw on us up to a total of twenty thousand dollars make this in two notes one to cover the difference between the amount of the advance and fifteen thousand dollars this would amount to approximately six thousand dollars make this one due September first try to satisfy them with this amount but if absolutely necessary you may make another note for five thousand dollars due October first both of these must draw eight percent of necessary to make either or both of these advances have a supplement drawn to our contract to provide that all money payable to them on shipments or new cut as provided for in the contract are to be applied to the payments of these notes except the sums to be deducted in satisfying previous obligations as provided for in the original contract wire fully what you have done and your plans for next week.

TURNER, DENNIS AND LOWRY LBR. CO.

Defendant's Exhibit 20, then admitted in evidence without objection, is a Western Union telegram, dated Kansas City, Mo., June 22, 1920, addressed to L. X. Juneau, care National Hotel, Kalispell, Montana, reading:

**Defendant's Exhibit No. 20.**

Met Donlan in Chicago last week he asked me for an advance of twenty thousand dollars will you

(Testimony of Louis X. Juneau.)

please go to Pablo and take complete inventory of all stock not covered by recent advances and wire us the total amount including both finished and unfinished piles would suggest that you mark the top course of each [233—127] tile and you tally it as will quite likely make them an advance on all lumber sawn regardless of weather in finished or unfinished tiles after completing inventory go to Missoula and we will wire you further instructions there then wiring give us as much information as possible reference the Pablo operation

TURNER DENNIS LOWRY.

By the WITNESS.—When I showed them to Mr. Donlan they made the notes out. I showed him what the wire had said, and to make the settlement to correspond to the contract, of the payments, and he had that drawn up by Mr. Violette, I think, as supplemental. When I showed him that telegram he said, “I will have to have the full amount of the money.” He had that agreement drawn up and I signed it afterwards. I don’t remember whether we were together when he had it drawn up or not. I think he told me he went to Mr. Violette’s office, if I remember right; I think we signed it up either in Mr. Violette’s office or the bank after I got the note—I don’t recall which place now. We made the notes in the bank; Mr. Keith wrote them out. I don’t recall whether I signed this three at that time or somewhere else, referring to Defendant’s



(Testimony of Louis X. Juneau.)

Exhibit "P," about which I have been testifying.

I was at Pablo the day of the fire and also after the fire. Mr. Henderson asked for information about card prices. I told him I had and gave him the prevailing card at that time. We also discussed what the prices was at that time, what the card showed.

Cross-examination by Mr. PARSONS.

What I had was a basic list gotten out by the Western Manufacturers Association. I took that with the latest discount [234—128] card and then read off the prices of this lumber. Mr. Rapp, representing the plaintiffs, and I, representing the defendant, did not agree on the prices if the lumber as over \$51 a thousand, on the average. I had nothing to do with the proof of loss, never saw it; I did not fix the prices of any. I read the prices off but had nothing to do with the proof of loss prices. If that afterward became the basis of the proof of loss or is the basis of the claim here, the bill of particulars of the plaintiffs, I don't know that.

I state that up to July they had their old machinery; it was old and antiquated and too slow. I am not familiar with the amount they shipped; it was about 11 cars up to August 3d. I think they had a million feet at all times that was ready planed and ready for shipment. They couldn't ship; they didn't want to run the machine.

(Testimony of Louis X. Juneau.)

As far as my conversations with either Donlan or Henderson are concerned, they always assured me that we were named in the insurance policies; that we were protected up to \$25. They never disputed that we were entitled to the insurance we claimed or more. I don't know whether, at the time of the fire, there wasn't more than five or six hundred thousand feet of lumber, not turned over to us by bill of sale, not stenciled in the name of the defendant, and whether there were not tramways and piles and bottoms that belonged to the plaintiffs in the case which was covered by this same insurance. I don't know the figures as to what there was, covered by these two policies of insurance, that belonged to the plaintiffs in addition to the 3,338,000 feet that had been turned over to me. The only reason they gave me for not turning over the \$20,000 when it was first received by them, Henderson said they needed the money worse than my people. That was all that was said about it. [235—129]

This contract that was drawn up later was entirely satisfactory to me. I sent my principals a copy of it.

Redirect Examination by Mr. TURPIN.

Prior to this June 22d or 26th, when I got this telegram, my practice has been to make the advance on finished piles. Under these instructions in the telegram I changed that plan. I inventoried the unfinished piles, those that were not completed.

(Testimony of Louis X. Juneau.)

The last inventory was made on August 3d; the fire on August 3d took the inventory continued and finished up on the morning of the 3d, and the fire was about noon. I had gone through the yard on this inventory and taken the unfinished piles. I couldn't say how much lumber was planed and ready to ship on April 16th. I understood Mr. Parsons' 2,000,000 feet to be undressed; there wasn't any such amount dressed.

Redirect Examination by Mr. PARSONS.

I think I accepted and had delivered to me by the plaintiffs in this case, on the 2d of August, or on the morning of the 3d of August, 1920, just the finished piles.

Witness excused.

**Testimony of Charles Carter, for Defendant.**

CHARLES CARTER, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is Charles Carter; I live in Spokane; I now am and for 25 years have been in the whole-sale lumber business. During the year 1920 I have been engaged in that business in Montana, for the Bradford-Kennedy Company. In the spring and summer of 1920, I had experience myself in the purchase of bulk lots of [236—130] lumber, and I was familiar with the stock of lumber which Don-

(Testimony of Charles Carter.)

lan & Henderson had at Pablo. Sales in bulk of a quantity of mill run lumber such as Donlan & Henderson had there were made to my knowledge during the year 1920; I helped make some of those myself. I know what was the market value, sold in bulk, of a stock of lumber such as they had at Pablo, in the spring or summer or at the time of the fire at their plant, in the summer of 1920, on August 3d; it was about \$30 per thousand feet. In saying that I have in mind that the lumber was dressed and f. o. b. cars. What makes the difference in the market price of lumber is that when it is finished you know what you are getting, and when it is in the pile you don't know what you are getting because you can't determine what the ultimate grade will be. Entering into the uncertainty as to the value is this element: If you are buying it at a stipulated price there would be the feature of a falling market or changed conditions or something of that kind.

I should say it would take three or four months, at least, under the conditions such as existed at Pablo, to put 3,000,000 feet of lumber through the planer and on board cars. During that time the market conditions would be likely to change one way or the other, and the likelihood of a change would affect the market value of a bulk purchase. I was familiar with that yard and stock; I estimate

(Testimony of Charles Carter.)

it would cost at least \$3.50 a thousand to plane and load on board cars such a stock.

The bulk purchases of mill run lumber upon which I base my opinion of market value were made more particularly in the spring. The market run better in the spring than it would have been August. After the increased freight rate on the 26th of August the market went down materially. I couldn't say as to what date the announcement of increased freight rates was [237—131] made, but I think it was made prior to the 3d of August that it was to go into effect on the 26th. If you had put bulk sales of lumber on the market at that time it was quite attractive, and by that I mean loading and getting them out before the freight rates advanced. After the announcement was made and in case the seller wouldn't guarantee shipment before the rates advanced, there wouldn't be any market for bulk sale of lumber in the month of August, 1920; there wasn't any market after the advance was made and the condition of the market has been about the same ever since; that is to say, there is no market for certain items. In August, 1920, it was generally very hard to get car equipment; I would say 10% of equipment was available for the various mills with which I was familiar—only 10% of the desired equipment could be procured at that time.



(Testimony of Charles Carter.)

I have had experience in observing the grades of lumber produced from a stock of timber such as Donlan & Henderson were cutting there, and I think I could state what grades could be produced from such stock. According to my estimation that would cut practically 15% of selects—that is, D and better, and 20% #2; about 50% of 3, 15% of 4; that is, taking in the whole logging consideration. As to whether it would be possible to cut there from that stock of timber 18½% of D and better selects, 26% 1 and 2 common, 20% 3 common, 10% 4 common, and 25½% dimension, it would depend largely on what you call a dimension; if the dimensions figured poorer grades that would increase your #3 item materially, which probably would make your #3 grade ultimately run up to 40 or 50%, and it might also be possible that that particular stock of logs there might cut 18½%, because it may vary a little as to the slight difference in the timber. I have never experienced a case in which the [238—132] 1 and 2 common exceeded in percentage the 3 common.

Cross-examination by Mr. PARSONS.

I haven't been selling lumber the past year; I have been buying in the Spokane office. I have made Idaho and Washington and Montana, practically all the time the last two years, most of the time on the road at these different places. I was buying for

(Testimony of Charles Carter.)

the firm of Bradford-Kennedy Company; I am not now; at present I am with J. J. Nolin Company, Denver. I am buying specific orders as a dealer; I have been with this firm since September first. At the time of my visit to the yard of Donlan & Henderson I was with Bradford-Kennedy Company, and had been with them 15 years.

Redirect Examination by Mr. POPE.

I bought no lumber from dealers in bulk at fixed prices only the one item that was bought from the firm of Donlan & Hoyt. That was, I believe, the 14th of last February—1920. I think about when the market was at the peak. The price there was a basis of \$30, finished product. I made no purchase of bulk lumber at a higher figure than that. I made purchases of lumber in bulk that were in general the same grade as that at Pablo.

Recross-examination by Mr. PARSONS.

What I got from Hoyt and Donlan that time was represented by Donlan and Hoyt both to be very high class timber. The character proved that it wasn't quite as nice a stock of timber as it was represented to be. To my knowledge it was not material that was termed or designated as scrubby stock. [239—133]

Redirect Examination by Mr. POPE.

Asked to assume two cases, one in which the purchaser of a bulk stock of lumber makes advances

(Testimony of Charles Carter.)

of a certain number of dollars per thousand feet to enable the manufacturer to manufacture his lumber, and the other in which he makes no such advance, and to state the effect on the market obtainable, I will say where the advancement is made that person would have to buy the small margin, that is, less price per thousand than if he made no advance. I *should one* should have three to five dollars per thousand difference.

Recross-examination by Mr. PARSONS.

He should have that with interest besides, for his risk and his profit, of maintaining his sales organization, and so forth.

Witness excused.

**Testimony of Edward Love, for Defendant.**

EDWARD LOVE, a witness called on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination by Mr. POPE.

My name is E. W. Love; I live in Missoula; I am and for 15 years have been engaged in the lumber business; at the present time I don't represent any concern. I have in the past represented other wholesale lumber concerns. I have been buying lumber for concerns on commission, at Spokane and at Omaha. The last year I was looking after the shipping of some lumber at Pablo, and prior to that I bought quite a lot at Perma. I have seen the stock of lumber and logs that Donlan &

(Testimony of Edward Love.)

Henderson had at Pablo during the year 1920. I was located at Pablo at [240—134] that time, not, however, in connection with this operation.

I know of purchases of stocks of lumber in bulk, and that come from the mill, being made in Montana, during the spring and summer of 1920, which were in character similar to that stock of Donlan & Henderson's. I, myself, had a part in making negotiations of some such purchases in bulk. I knew from my own knowledge of such sales and purchases, what the market value of a stock of lumber of approximately 3,000,000 feet, such as Donlan & Henderson had at Pablo, was on August 3d, 1920; it was about \$30 per thousand feet. I calculated that under circumstances requiring the seller to plane and deliver on board cars. I know what equipment Donlan & Henderson had at that point for planing and loading on board cars, and am able, from my experience in lumber operations, to state what the cost of planing and loading on board cars would be; it would be about \$3.50 a thousand.

As to what difference it would make with the market for lumber whether it was to be sold in bulk, mill run, or the sales made in carload lots, loaded for delivery, I will say if I was to go out and buy a car of lumber I would expect to pay more money for one particular car than I would if I buy the entire cut; the reason for buying the entire cut I would expect to make a pretty good margin on it; you have to pay interest on your

(Testimony of Edward Love.)

money and then, in ordering cars, there is generally a shortage, and your order may be cancelled, and there are different things arises. The element of time required to load and ship out would make a difference in the margin. In my opinion, in view of the equipment which Donlan & Henderson had at that point at that time, and the quantity of lumber there on the 3d day of August, 1920, it would take about four months for them to put that through the planer and ship it out on cars. I figure [241—135] about five cars a week.

As to the bulk sales on which I based my opinion as to the market, there was Mr. Russell at Plains; the Owens Lumber Company, at Spokane, we purchased his entire cut; that was in December, 1919; and then I was negotiating a deal with Donlan & Hoyt in the winter of 1920, along in January and also a man named Rogers, at Roman. Those were all sales in which I personally took a part. I was at that time familiar with the sales that were being made, generally, through others. I had known at the time what were the prices obtained in the market generally for those bulk lots of lumber. My opinion as to the market value is based on information that I had in that way.

Cross-examination by Mr. PARSONS.

I ran a planer at Plains; I had a million and a quarter feet of lumber I bought from Mr. Russell; I bought that myself in the summer of 1919. It was W. O. Burrill's planer; I operated it myself



(Testimony of Edward Love.)

part of the time. As to whether that Russell cut was a sort of a bankrupt sale, the Farmers and Merchants Bank down there had quite a little money tied up in it. I don't think they made him sell it to stop foreclosure. I did not go with Bradford-Kennedy's man to see this Russell cut; I bought it myself.

I lived at Perma three or four years; I just had a small stock there; I would sometimes have a car-load at a time and up to three cars. I have been buying and selling lumber the last two years. I purchased a cut of lumber from Russell, at Plains, myself, and sold it out. Then I negotiated a deal with Russell with a lumber company of Spokane, and also with Donlan & Hoyt; I was the one who had the deal negotiated, and also a deal with Rogers. That deal was involved in a lawsuit. Russell, in the [242—136] Spokane deal, was not to my knowledge, involved in a lawsuit.

Witness excused.

Thereupon, counsel for the defendant read to the Court, as a part of the evidence on behalf of the defendant, the deposition of Earl De Veuve, as follows:

**Deposition of Earl De Veuve, for Defendant.**

Direct Examination by Mr. HALL.

My name is Earl De Veuve; age 46; occupation, assistant manager of the lumbermens Indemnity Exchange and the Inter-Insurance Exchange. I live here in Seattle. The Inter-Insurance Exchange

(Deposition of Earl De Veuve.)

is a co-operative insurance organization carried on by the various lumbermen that insure the properties one with the other. In my business as officer of the Inter-Insurance Exchange I have done business with the firm of Donlan & Henderson, of Montana. We carried insurance on their lumber yards and I believe on their mill; I am not positive about the mills at the present time. I have with me the policies that we issued on the property of Donlan & Henderson, at Pablo, Montana. The policies in this case were turned over to our attorneys, Donworth & Todd, with reference to the case against the Northern Pacific Railway, a subrogation case. We afterwards instructed Mr. Todd to send these policies to Eugene Davis, of Spokane, Washington, who was at that time representing some of the other companies in similar cases. I have not in my possession any of the proofs of loss that were submitted; they were also turned over to Donworth, Todd & Higgins for the same purpose as the policies. I have in my files letters or telegrams from Donlan & Henderson relative to the payment of the amount to be paid by reason of the fire loss.

The paper marked Identification "A" is a letter from Donlan [243—137] & Henderson instructing the Inter-Insurance Exchange to cover \$30,000 on lumber piled in new yard. The date of this letter is June 17th, 1920; the other papers attached are various acknowledgments. The paper marked "B" for identification is a letter from Donlan & Henderson addressed to the Inter-Insurance Ex-

(Deposition of Earl De Veuve.)

change, to cover \$30,000 on lumber in new yard, planing-mill buildings and additions \$2,500, lumber in planing-mill shed \$3,000, and planing-mill machinery, including boilers and engines, etc., \$2,500. In answer to that letter we issued insurance to that amount; we answered that by telegram and subsequently by letter. The paper marked "C" for identification is policy number 30,690, issued by the Inter-Insurance Exchange to Donlan & Henderson, dated July 20, 1920, amount of insurance \$22,500 on stock of lumber in new yard at Pablo, Montana. The document marked "D" for identification is policy number 30,532, issued by Inter-Insurance Exchange to Donlan & Henderson, under date of June 19th, 1920, covering \$30,000 on stock of lumber in their new yard at Pablo, Montana. We wrote other policies for Donlan & Henderson in the Inter-Insurance Exchange covering buildings and equipment as described in that letter. We placed \$7,500 with the Peninsula Fire Insurance Company; that covered the same stock that the Inter-Insurance Exchange policies covered, stock of lumber at Pablo, Montana. That was payable to the insured, as far as I know, unless there was an endorsement on it—to Donlan & Henderson. That loss was paid after the fire; the fire was August 3d, 1920.

The paper marked "E" for identification is a sworn statement of proof of loss to the Inter-Insurance Exchange, By Donlan & Henderson, under Inter-Insurance Exchange policy No. 30,690.

(Deposition of Earl De Veuve.)

In the transaction of our insurance business we require that sworn statement from the insured before we pay any loss, in all [244—138] cases; the claimants are required to make those sworn statements. The paper marked "F" for identification is a sworn statement of proof of loss to the Inter-Insurance Exchange on the Donlan & Henderson policy No. 30,532 of the Inter-Insurance Exchange, which was presented to us in due course of business the same as the other one just offered. That is signed individually by Edward Donlan and B. W. Henderson. These papers have been in the possession of myself or our attorney ever since they were submitted to us.

The paper which has been marked "G" for identification is an article or subrogation issued by Edward Donlan and Ben Henderson to the Inter-Insurance Exchange; the signatures to that instrument are those of Edward Donlan and Ben Henderson. That was probably delivered to our adjuster there in Pablo, or Spokane; I have no knowledge of that; it reached us by coming from our adjuster. The document marked "H" for identification is an article of subrogation issued by Edward Donlan and Ben W. Henderson to the Inter-Insurance Exchange on policy No. 30,352, received by us in the due course of business in connection with this loss.

Under policy No. 30,532, the final draft in payment was dated at our office October 26th, 1920. There had been an advance payment on September

(Deposition of Earl De Veuve.)

9th, 1920, of \$10,000. The payment under policy No. 30,690, the final draft was issued from our office on the 15th day of November, 1920, an advance payment was made on November 6th, 1920, of \$6,000. These show the receipts for the payment of loss.

The paper marked "I" for identification is a draft issued by the Inter-Insurance Exchange to Donlan & Henderson for \$20,000, being balance due on account of loss on August 3d, 1920, under policy No. 30,532; to this draft is attached a receipt [245—139] for the total amount of claim involved under that particular policy. The paper which has been marked "J" for identification is a loss draft issued by Inter-Insurance Exchange to Donlan & Henderson, in payment of \$15,937.50, being the balance due Donlan & Henderson on policy No. 30,690 on account of fire loss August 3d, 1920. Receipt for the total amount of \$22,500 is attached to this draft, the receipt being signed by Donlan & Henderson, by Ben W. Henderson and by Edward Donlan. We require a receipt; if a firm, either member can sign that. But in that case we evidently got them both to sign, as an extra precaution on the part of our adjuster, I presume.

We did not issue any policies on this lumber at Pablo in which Turner, Dennis & Lowry Lumber Company, a corporation, of Kansas City, Missouri, was named as the insured. I do not know Donlan and Henderson personally, and never met them; I never had any personal conversation with them. I



(Deposition of Earl De Veuve.)

am here in answer to a subpoena *duces tecum* issued by the United States District Court for the Western District of Washington, and ordered to bring these papers into court. All these papers that I have produced have been produced under subpoena *duces tecum*. My brother, James H. De Veuve, is out of town; I think he has no personal acquaintance with Donlan and Henderson; I don't think he ever met either gentleman. He would have no further records or correspondence that I have here.

Defendant's Exhibit "A," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is a letter from Inter-Insurance Exchange to Donlan & Henderson, dated June 25, 1920, reading as follows:

**Defendant's Exhibit "A."**

"Pursuant to our letter of June 19th we hand you herewith the above policy covering \$30,000 insurance on your Yard Stock, same having been issued in lieu of binder #1603. [246—140]

"Trusting the enclosed policy will be found entirely in order and again thanking you for the additional insurance \* \* \* "

Also, a letter from Inter-Insurance Exchange to Donlan & Henderson, dated June 19, 1920, reading:

"In accordance with your favor of June 17th we have covered for you \$30,000 insurance on stock in New Yard and we enclose herewith Inter-Insurance Exchange of Seattle, Wash., binder #1603, which please accept as evidence of protection pending receipt of policy. \* \* \* "

Also, a letter from Donlan & Henderson to Inter-Insurance Exchange of Seattle, Wash., dated June 17, 1920, as follows:

“Herewith enclose check amounting to \$337.50, being premium due on insurance of our sawmill and machinery for term of one year as per your insurance binder written June 14th, 1920.

“We desire you to write, effective at once, \$30,000.00 on lumber piled in yard designated as New Yard. At present this yard has a 200 ft. clear space, but in a short time lumber will be moved to give it a 250 ft. clear space.”

Defendant's Exhibit “B,” attached to said deposition, consists of the following: A letter from Inter-Insurance Exchange to Donlan & Henderson, dated July 28, 1920, reading:

**Defendant's Exhibit “B.”**

“Pursuant to our letter of July 20th we hand you herewith the above policies covering respectfully \$8,000 insurance on Planing Mill, Machinery and Stock, and \$22,500 insurance on Yard Stock, same having been issued in lieu of binders Nos. 1673 and 1680.

“Policy in lieu of Peninsular Fire Insurance Company binder will follow in due course.

“Trusting the enclosed \* \* \* ” [247—141]

Also a letter from Inter-Insurance Exchange to Donlan & Henderson, dated July 20, 1920, reading:

“We acknowledge receipt of your favor of July 16th requesting us to cover \$30,000 additional insur-

ance on lumber in new yard and \$8,000 insurance on Planing Mill Building and Additions, Machinery therein and Stock therein.

“In reply we wish to confirm our telegrams to you of July 19th and this date reading as follows:

“‘Order sixteenth received covering all except new yard endeavoring to place will wire when covered.’

“‘Covering thirty thousand additional new yard thus completing order.’

“We now enclose herewith Inter-Insurance Exchange of Seattle, Wn., binder #1673 covering \$8,000 insurance on Planing Mill Building and Additions and Contents and Inter-Insurance Exchange of Seattle, Wn., binder #1680 covering \$22,500 insurance on stock in new yard, also Peninsular Fire Ins. Company binder #446 covering \$7,500 insurance on stock in new yard, all of which please accept as evidence of protection pending receipt of policies.

\* \* \* ”

Also, Western Union telegram from James H. De Veuve to Donlan & Henderson, dated July 20, 1920, reading, “Covering thirty thousand additional new yard thus completing order.”

Also, Western Union telegram from James H. De Veuve to Donlan & Henderson, dated July 19, 1920, reading “Order sixteenth received covering all except new yard endeavoring to place will wire when covered.”

Also a letter from Donlan & Henderson, by B. W. Henderson, to Inter-Insurance Exchange of Seattle, Wash., dated July 16, 1920, reading:

“You will please write insurance as follows, policies to [248—142] be effective at once.

Lumber in New Yard.....	\$30,000.00
Planing Mill Building and Additions	2,500.00
Lumber in Planing Mill Shed which is an addition.....	3,000.00
Planing Mill Machinery, including Boiler and Engine and parts and Accessories thereto.....	2,500.00

“We would like the lumber in New Yard written up in separate policies of \$5,000.00 each, totalling \$30,000.00.”

Defendant's Exhibit “C,” attached to said deposition, then admitted in evidence over the plaintiffs' objection, is policy number 3,690 of the Inter-Insurance Exchange of Seattle, Wash., New York and Washington standard form, whereby the company insures Donlan & Henderson for a premium of \$337.50, from noon of July 20, 1920, to noon of July 20, 1921, in the amount of \$22,500 on property described as follows: On stock of every description, consisting principally of lumber, shingles, laths, mouldings, pickets, cross-pieces, stickers, posts, wood, telegraph poles, timber, and timber products, manufactured, and in process of manufacture, their own or held by them in trust or on commission or on consignment or sold but not removed or for which they may be held responsible; all while contained in yard known as New Yard, situate on premises occupied by assured as owners, lessees or operators, about one and one-half miles north of Pablo, Montana.

Defendant's Exhibit "D," attached to said deposition, then admitted in evidence over the objection of the plaintiffs, is policy number 30,532 of the Inter-Insurance Exchange of Seattle, Wash., New York and Washington standard form, whereby [249—143] the said company, for a premium of \$400, insures Donlan & Henderson, in the sum of \$30,000, for the term of one year from noon of June 19th, 1920, to noon of June 19th, 1921, against direct loss or damage by fire, upon the following described property: On stock of every description consisting principally of lumber, shingles, laths, mouldings, pickets, cross-pieces, stickers, posts, wood, telegraph poles, timber and timber products, manufactured, or in process of manufacture, their own or held by them in trust or on commission or on consignment or sold but not removed or for which they may be held responsible; all while contained in yard known as New Yard, situate on premises occupied by assured as owners, lessees or operators about one and one-half miles north of Pablo, Montana.

Defendant's Exhibit "E," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is a sworn statement in proof of loss made by the plaintiffs to the Inter-Insurance Exchange of Seattle, Washington, under policy number 30,690, which, after describing said policy and the terms thereof, and the various riders, permits and clauses thereof, describes the occurrence of the fire, the cause thereof; states the total insurance on the property to be \$60,000, the occupation and



ownership of the building described; states that no other person or persons had any interest, lien or encumbrance in or on the property insured; states that since the issuance of said policy there has been no assignment, or transfer, or incumbrance of said property, nor any change in the title, use, occupancy, location, possession or exposure of the same; and schedules the loss thereon caused by said fire and for which claim is made, as follows: [250—144]

### Defendant's Exhibit "E."

1st Item of Policy	Cash Value	Whole Loss	Whole Insurance	Amount	Amount
				Named in this Policy	Claimed under this Policy
	92,813.57	92,813.57	60,000	22,500	22,500
TOTALS	92,813.57	92,813.57	60,000	22,500	22,500
TOTAL AMOUNT CLAIMED OF THIS COMPANY UNDER ABOVE-NAMED POLICY \$22,500.					

—the proof concluding with the usual printed portions of such proofs of loss, the signatures and verifications of Edward Donlan and Ben W. Henderson.

Defendant's Exhibit "F," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is a Sworn Statement in Proof of Loss, made by the plaintiffs to the Inter-Insurance Exchange of Seattle, Washington, under policy number 30,532, which, after describing said policy and the terms thereof, and the various riders, permits and clauses thereof, describes the occurrence of the fire; the cause thereof; states the total insurance on the property to be \$60,000; the occupation and

ownership of the building described; states that no other person or persons had any interest, lien or encumbrance in or on the property insured; states that since the issuance of said policy there has been no assignment, or transfer, or incumbrance of said property, nor any change in the title, use, occupancy, location, possession or exposure of the same; and schedules the loss thereon caused by said fire, and for which claim is made, as follows:

**Defendant's Exhibit "F."**

	Cash	Whole	Whole	Amount	Amount
1st Item of	Value	Loss	Insur-	Named	Claimed
Policy			ance	in this	under this
				Policy	Policy
	92,813.57	92,813.57	60,000	30,000	30,000
* * * * *					

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TOTALS 92,813.57 92,813.57 60,000 30,000 30,000  
TOTAL AMOUNT CLAIMED OF THIS COMPANY UNDER ABOVE-  
NAMED POLICY \$30,000."

[251—145]

—the proof concluding with the usual printed portions of such proofs of loss, and the signatures and verifications of Edward Donlan and Ben W. Henderson.

Defendant's Exhibit "G," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is an Article of Subrogation, dated August 18th, 1920, wherein Edward Donlan and Ben W. Henderson, whose signatures are thereunto affixed, assign, transfer, set over and subrogate to the Inter-Insurance Exchange Insurance Company, of Seattle, Washington, their claims, etc., to the extent of \$30,000, against the Northern Pacific Railroad or any other party, person or corporation, who may be liable or thereafter adjudged liable for the

burning or destruction of the property insured by the assignee under its policy number 30,532, the consideration named being the payment of \$30,000 by the assignee under said policy.

Defendant's Exhibit "H," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is an Article of Subrogation, dated August 18th, 1920, wherein Edward Donlan and Ben W. Henderson, whose signatures are thereunto affixed, assign, transfer, set over and subrogate to the Inter-Insurance Exchange Insurance Company, of Seattle, Washington, their claims, etc., to the extent of \$22,500, against the Northern Pacific Railroad or any other party, person or corporation, who may be liable or thereafter adjudged liable for the burning or destruction of the property insured by the assignee under its policy number 30,690, the consideration named being the payment of \$22,500 by the assignee under said policy. [252—146]

Defendant's Exhibit "I," attached to said deposition, then admitted in evidence over the plaintiff's objection, is a draft for \$20,000 payable to Donlan & Henderson, drawn by the Inter-Insurance Exchange, dated October 26th, 1920, together with a receipt attached, and endorsement of "Donlan & Henderson by Ben W. Henderson, Edward Donlan," all as described by the witness to whose deposition it is attached.

Defendant's Exhibit "J," attached to said deposition, then admitted in evidence over the plaintiff's objection, is a draft for \$15,937.50, dated November 15th, 1920, drawn by the Inter-Insurance Exchange,

payable to Donlan & Henderson, together with a receipt attached, and endorsement of "Donlan & Henderson, by Ben W. Henderson, by Edward Donlan," all as described by the witness to whose deposition it is attached.

Thereupon counsel for the defendant read to the Court, as part of the evidence on behalf of the defendant, the deposition of Frank E. Partridge, as follows:

**Deposition of Frank E. Partridge, for Defendant.**

Direct Examination by Mr. HALL.

My name is F. E. Partridge; I live in Spokane, Washington, and my business is adjuster of fire losses for insurance companies; my age is 53. I am an independent adjuster, have no connection with any particular company, but adjust losses for any and all companies demanding my services. I am acquainted with Edward Donlan and Ben W. Henderson, doing business under the firm name and style of Donlan & Henderson, of Pablo, Montana. I have been acquainted with Ed. Donlan for about a year; Ben Henderson I met on or about August 4th, 1920. Since my acquaintance with them I have been called upon to adjust [253—147] a loss by fire on property belonging to them. I adjusted a loss on property owned by Ed. Donlan on a fire that occurred, I believe, in January, 1920; the fire was at Thompson Falls, Montana.

I adjusted a loss on property belonging to Donlan & Henderson upon property located at Pablo, Montana, on a fire that occurred August 3, 1920. It was

(Deposition of Frank E. Partridge.)

lumber piled in the mill yard that was destroyed. I have in my possession records that show the piles and number of feet of lumber that were destroyed in that fire. I have a statement filed with me by Donlan and Henderson, purporting to show the amount of lumber in the old yard. That purports to show all the lumber that was destroyed for which they made claim to me. The instrument I hold in my hand is designated by Donlan & Henderson as "Inventory, Old Yard, April 1, 1920," and purports to contain a piece tally of the lumber contained in that yard at that date; that purports to be the lumber that was destroyed by the fire that I have already testified about. I am not willing that the original may be attached to my deposition as an exhibit, and decline to surrender the original, but will deliver it to the stenographer for the purpose of making a copy only.

I adjusted the losses on the Donlan & Henderson fire on the 3d of August for the American Insurance Company of New Jersey, covering \$25,000; Firemen's Fund of San Francisco, covering \$25,000; Palatine Insurance Company of Great Britain, covering \$20,000. I don't know to whom this money was paid. My file shows that the policy was running to Donlan & Henderson.

I talked to both Donlan and Henderson concerning ownership of this property that was destroyed in the August fire, more particularly to Ed. Donlan. That was on or about August [254—148] 10, 1920, at the Donlan & Henderson office, in Pablo,



(Deposition of Frank E. Partridge.)

Montana. I had various conversations with them during that day, all of which were in the presence of various persons. Otto R. Daly, Mr. Keith, a bookkeeper for the firm, whose name I do not know. Sometimes the conversations were in the presence of both partners, other times in the presence of only one partner. At times we were entirely alone, but at other times, in the presence of the parties I have named. Our conversation was so general that it would be difficult to tell all that was said. At one time we were talking of the origin of the fire, and another time of the quantity of material, quality and various things in connection therewith. Mr. Donlan, at that time, made statements to me concerning the ownership of the property destroyed. He stated that Donlan & Henderson purchased this property from Smead on or about April 1, 1920. He said Donlan & Henderson was the owner of the lumber at the *property* it was destroyed, subject to an interest of Turner, Dennis & Lowry, and he told me what the interest of Turner, Dennis & Lowry Lumber Company was—that they had advanced money to Donlan & Henderson, and the amount, I believe, is shown in policy. My recollection is that it was either twenty or twenty-five dollars per thousand. I don't seem to have an exact copy of that policy here. This advance was made in a contract of sale, and I asked him for a copy of that contract of sale, and he said he didn't have it. A statement was made to me at that time referring to this subject matter; that Donlan & Hen-

(Deposition of Frank E. Partridge.)

derson was not the owner of the lumber, but that it belonged to Turner, Dennis & Lowry Lumber Company. That statement was that they had advanced \$20 a thousand on a contract of sale. I asked Donlan for a copy of it and he said he didn't have a copy at the office, but I understood him to say he [255—149] had a copy in his office in Missoula. They claimed that they had made an outright sale of all that lumber that was destroyed to Turner, Dennis & Lowry. My recollection is that they had made a sale under this contract to them. I never obtained a copy of the contract, nor read a copy of it; they never supplied me with a copy of it.

As to whether Donlan & Henderson made the proof of loss, it must have been signed by Donlan & Henderson, but I haven't any definite recollection of seeing the proof after it was signed. I made up proofs of loss for the three companies and mailed them to either Ed. Donlan at Missoula, or Donlan & Henderson, at Pablo. It was several weeks before they were finally returned to me, and I haven't a definite recollection of seeing them after they were returned, but would state that they must have been signed by Donlan & Henderson in the manner in which I asked them to have them signed, or they would never have been sent on to the company. I do not have a copy of the policy in my office. I mailed them to the San Francisco offices of the companies making them.

I have not in my office a copy of the proof of loss, any more than a condensed copy of the inventory

(Deposition of Frank E. Partridge.)

which is given to the stenographer to keep; it is a condensed copy of that. The proof of loss would now be in the office of the several companies in San Francisco, if it has not been sent on to the home office. The Fireman's Fund proof of loss should be in the home office in San Francisco.

I am not willing that the original paper now handed to the stenographer and marked Exhibit "B" for identification may be attached to my deposition as an exhibit, and I decline to surrender the original. Defendant's Exhibit "B" is a blank form of proofs of loss which I use in my business. When the proof [256—150] of loss is made it is necessary to file a sworn statement like Defendant's Exhibit "B." In a case of a copartnership, one or both members make that statement. The statement should be signed by the firm name, by whichever member of the firm wields the pen, and that member of the firm is supposed to be sworn to in the jurat below. In this case there was proof of loss made out by either Donlan or Henderson, or both of them, upon a blank similar to Defendant's Exhibit "B." I couldn't say positively that it was signed and sworn to before a Notary Public as to the contents of it, as I have no recollection of seeing them, but my strong opinion is that it was, or it would never have been sent on to the companies. In the ordinary course of business that is the way it must have been done, or otherwise they would not have been sent; in this case it must have been done.

The paper marked Defendant's Exhibit "C" is

(Deposition of Frank E. Partridge.)

a copy of the schedule referred to in the proof of loss. The original is supposed to be in the San Francisco office of the different companies. The original was made up from the detailed piece tally which was furnished me by the assured, Donlan & Henderson. This paper is what you call a statement of loss. It purports to show the claim of the assured on lumber destroyed and contained in the old yard at the time of the fire. The copy that is attached to the proof is with the files in San Francisco. The copy, Exhibit "C," which counsel holds in his hand, is part of my office records. I am not willing that this paper may be filed and attached to the deposition; I desire to keep that as part of my office files, but I am willing that the stenographer may make a copy of this to attach to the deposition.

I saw the policies; these are the policies that I presume [257—151] have been sent to San Francisco in due course of business to the head office of the companies, as that is the natural course of business. None of these policies referred to were issued in the name of Turner, Dennis & Lowry Lumber Company. These that I have testified about were all issued in the name of Donlan & Henderson with, as I recall it, the loss payable clause to Turner, Dennis & Lowry, covering the amount of their advance on contract of purchase.

I had nothing whatever to do with the payment of the money. In my business I simply adjust the loss and arrive at how much the assured has been

(Deposition of Frank E. Partridge.)

injured, make a report to the company and the company settles the matter themselves. I have in my files just one letter from Donlan & Henderson in reference to this fire. That letter is marked Defendant's Exhibit "D"; it is part of my office file and I desire to keep it in my office; I am willing that the stenographer may make a copy of it and attach to my deposition. The letter, Exhibit "D," was received by me in the due course of mail from Donlan & Henderson. I presume there were enclosures with the letter but I don't have any recollection on the subject. As to whether or not my office received at about that time the proof of loss and articles of subrogation referred to in this letter, my stenographer informed me those were received and forwarded to the company. That would be done by my clerk without my knowledge.

The Articles of Subrogation referred to in this letter subrogates the right of action against the Northern Pacific Railway Company, on account of the presumption that they may have set the fire. I have not a copy of the Articles of Subrogation referred to, and do not know by whom that was signed. In the ordinary course of business they should have been signed [258—152] by Donlan & Henderson and Dennis, Turner & Lowry. I have no knowledge now as to who all signed them; I have no recollection of having seen them. I do not know how much or the total insurance that was paid to Donlan & Henderson; I don't know for the companies that I adjusted for.



(Deposition of Frank E. Partridge.)

As to whether Donlan or Henderson told me, or said anything to me at the time I had the conversation with them at Pablo to which I have already testified, about what was to be done with the lumber after they had repaid Turner, Dennis & Lowry the \$20 or \$25 a thousand that they had advanced on the lumber, there was no direct conversation as to their ever paying that advance. My understanding was that that was part of the contract of the sale and that advance was to be repaid in the course of execution of the contract, in lumber. There was no direct conversation as to repayment; in fact, I didn't understand that they were to ever be repaid; that was in furtherance of the contract to purchase. There was no conversation in regard to repaying.

As I have already stated, in regard to the contract of purchase, Senator Donlan said that the lumber was sold to Dennis, Turner & Lowry on a written agreement, and that they had advanced to Donlan & Henderson so much per thousand feet; the lumber was to be shipped to Turner, Dennis & Lowry. They didn't say anything to me about this \$20 a thousand advance by Turner, Dennis & Lowry, that it was to be paid back; there was no conversation as to their ever paying back that money. This lumber was sold, and they paid so much on the contract. As to whether anything was said by Donlan or Henderson, or either of them, about what compensation Turner, Dennis & Lowry was to be paid for selling the lumber, I didn't understand that

(Deposition of Frank E. Partridge.)

they were to sell the lumber. I gathered from the talk [259—153] that there was a contract in existence whereby Donlan & Henderson sold Dennis, Turner & Lowry the lumber in this old yard and had received \$20 a thousand advance for the lumber, the balance to be paid as delivered. I had no particular interest in the detail of that contract except to ascertain that Donlan & Henderson had an insurable interest in this lumber of such amount as would warrant my accepting proofs of loss. I did find that an insurable interest, and for that reason I accepted the proofs of loss from Donlan & Henderson.

Defendant's Exhibit "A," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is in words and figures as follows, to wit:

### Defendant's Exhibit "A."

#### INVENTORY OLD YARD—4-1-20.

591 Pcs.	1 x 4—12	No. 1 & 2 Com.	2,364	
1281	14	"	5,978	
1457	16	"	7,771	16,113
1644	1 x 6—12	"	9,864	
1824	14	"	12,768	
5017	16	"	40,136	62,768
1946	1 x 8—12	"	15,568	
2371	14	"	22,130	
9092	16	"	96,980	134,678
1746	1 x 10—12	"	17,460	
1092	14	"	12,750	
6627	16	"	88,360	118,560
805	1 x 12—12	"	9,660	
1126	14	"	15,765	
10705	16	"	171,282	196,706
	8 x 10 ft.			21,680

# 328 *Edward Donlan and Ben W. Henderson vs.*

1471	1 x 4—12	No. 3 Com.	5,884	
2501	16	"	13,339	19,223
1541	1 x 6—12	"	9,246	
1327	14	"	9,289	
4391	16	"	35,128	53,663
1289	1 x 8—12	"	10,321	
1104	14	"	10,304	
6233	16	"	66,485	87,101
1183	1 x 10—14	"	13,794	
4060	16	"	54,133	67,927
830	1 x 12—12	"	9,960	
1119	14	"	15,666	
5545	16	"	88,720	114,346
	Mixed 18 & 20	"		18,180
	" 8 & 10	"		5,025
	No. 4 Boards			207,539
			For'd	1,123,509

[260—154]

## INVENTORY OLD YARD—4-1-20.

				1,123,509
1838	Pcs. 2 x 4—12	No. 1 Com.	14,704	
8326	14	"	21,709	
8218	16	"	87,658	
12	18	"	144	
1	20	"	13	124,228
9	2 x 6—10	"	90	
1082	12	"	12,984	
1962	14	"	27,468	
7133	16	"	114,098	
82	18	"	1,476	
78	20	"	1,560	
19	24	"	456	158,132
4	2 x 8—10	"	53	
707	12	"	11,312	
1016	14	"	18,966	
3240	16	"	64,965	
236	18	"	5,664	
20	20	"	533	
10	24	"	320	101,813
2	2 x 10—10	"	33	
388	12	"	7,760	

488	14	No. 1 Com.	11,387	
1094	16	"	29,173	
312	18	"	9,360	
89	20	"	2,967	
8	22	"	294	
6	24	"	240	61,214
2	2 x 12—10	"	120	
166	12	"	3,984	
280	14	"	7,840	
1359	16	"	43,488	
156	18	"	5,616	
23	20	"	920	
6	22	"	264	
7	24	"	336	62,568

For'd. 1,631,464

INVENTORY NEW YARD—4-1-20.

				1,631,464
6 Pes.	2 x 14—16	No. 1 Com.	224	
4	24	"	224	
1	2 x 16—10	"	27	
8	16	"	341	
3	2 x 18—16	"	144	
3	2 x 20—16	"	160	
1	2 x 12—18	"	36	1,156
	Mixed widths and lengths			28,444
1	3 x 8—12	Com.	24	
36	16	"	1,152	
1	3 x 10—10	"	25	
2	14	"	70	
56	16	"	2,240	
1	18	"	45	
4	3 x 12— 8	"	96	
4	10	"	120	
194	12	"	6,984	
1076	14	"	45,192	
290	16	"	13,920	
3	3 x 14— 8	"	84	
3	12	"	126	
[261—155]				
5	20	"	350	
1	4 x 4—14	"	19	
4	16	"	85	

330 *Edward Donlan and Ben W. Henderson vs.*

3	4 x 5—12	"	60	
6	16	"	160	
3	4 x 6— 8	"	48	
2	10	"	40	
1	12	"	24	
5	14	"	140	
12	16	"	384	
5	20	"	200	
4	6 x 6— 8	"	96	
117	12	"	4,212	
4	14	"	168	
467	16	"	22,416	
1	18	"	54	98,534
For'd				<hr/> 1,759,598

INVENTORY OLD YARD—4-1-20.

3	Pes. 6 x 8—12	Com.	144	1,759,598
5	14	"	280	
2	8 x 8—12	"	128	
1	16	"	85	
1	3 x 14—16	"	56	
5	12 x 12—14	"	840	
2	18	"	432	
	Mixed Dim.		39,938	
	Cross stripes clear piles		54,109	
	Roofs " "		11,206	
	1¼" Clears		19,628	
	Wide " 1"		18,687	
	Mixed widths 1"		7,203	
	1 x 4s		81,258	
	6s		89,945	
	8s		61,484	
	10s		52,421	
	12s		26,357	
	2" All W & L		32,908	497,109
				<hr/> 2,256,707



Defendant's Exhibit "B," attached to said deposition, then admitted in evidence over the plaintiffs' objection, is an ordinary blank form of Sworn Statement in Proof of Loss, designed for proof under policy issued by any company.

Defendant's Exhibit "C," attached to said deposition, then admitted in evidence over the plaintiff's objection, is in words and figures as follows, to wit:

### Defendant's Exhibit "C."

#### STATEMENT OF LOSS.

DONLAN AND HENDERSON.

PABLO, MONTANA.

[262—156]

FIRE AUGUST 3, 1920.

#### OLD YARD:

Inventory of yard 4-1-20	2,256,707 ft.	
Shipments of lumber taken out of yard and sked since inventory.....	292,023'	
Shed inventory 8/5.....	66,461	
	<hr/>	
	358,484	
Less purchased in shed..	106,486	251,998
	<hr/>	
	2,004,709 ft. @ \$35.00	\$70,164.82
2 hand carts.....		110.29
Interest on \$20,000.00 3/25.....		577.77
" " \$52,589.40 4/15.....		1,285.55
Difference between our inventory and amount we will have to settle on with parties from whom purchased .....	8,813	308.46
Insurance .....		1,575.00
	<hr/>	<hr/>
	2,013,522 ft.	\$74,021.89

## (Deposition of O. R. Daly.)

Lumber bought from Smead—SOUND VALUE LOSS &  
DAMAGE.

New Cut piled on old bottoms.

8000 ft. 1½" shop and better @ \$37.00 cost of manufacturing	296.00
4000 " 1" " " " " " " " " " "	148.00

SOUND VALUE LOSS AND DAMAGE in Old Yard..\$74,465.89

\* \* \* \* \*

## SCHEDULE OF INSURANCE AND APPORTIONMENT OF CLAIM.

Policy No.	Company.	Insures.	Pays.
223412	American Insurance Company	\$25,000.00	\$25,000.00
884833	Firemen's Fund " "	25,000.00	25,000.00
1092524	Palatine Insurance Company	20,000.00	20,000.00
		<u>\$70,000.00</u>	<u>\$70,000.00</u>

Defendant's Exhibit "D," attached to said deposition, then admitted in evidence over plaintiffs' objection, is a letter, dated Aug. 17, 1920, from Donlan & Henderson to Frank E. Partridge, Spokane, Wash., reading as follows:

**Defendant's Exhibit "D."**

"You will find enclosed Proofs of Loss and Articles of [263—157] Subrogation which were enclosed with the policies in your letter of the 11th inst. These are signed as per your instructions."

Counsel for the defendant then read to the Court as part of the evidence on behalf of the defendant, the deposition of O. R. Daly, as follows, to wit:

**Deposition of O. R. Daly, for Defendant.**

Direct Examination by Mr. HALL.

My name is O. R. Daly; my age 37, my occupation fire insurance, and my residence Spokane,

(Deposition of O. R. Daly.)

Washington. My particular line of fire insurance is sawmill, wood-work, manufacturers and lumber. I both write insurance and am an adjuster. I know the firm of Donlan & Henderson, of Pablo, Montana, and am personally acquainted with the members of that firm. Their names are Ben W. Henderson and Ed. Donlan. I have had business dealings relative to fire insurance with these parties within the last year. I wrote the insurance on their sawmill operations at Pablo, and also wrote insurance covering the new cut of lumber in the mill yard. In the insurance which I wrote I made up the policies myself; those policies were payable to Donlan & Henderson. I insured them in the Inter-Insurance Exchange of Seattle, Washington. The total amount of insurance placed through me on the Donlan & Henderson lumber at Pablo was \$60,000.00, and this amount was all payable to Donlan & Henderson.

I had conversations with Donlan or Henderson relative to their relations with the defendant, the Turner, Dennis & Lowry Lumber Company. The first conversation took place in the latter part of April, 1920. Now, we talked about it more or less, but in the final talk we had, I don't think there was a soul present except Ed. Polleys and myself. My conversation was with [264—158] Ben W. Henderson; also about July 23 or 24 I again talked it over with him. In the first conversation with him in April I told him that I would like the insurance on his mill and on his yard and he told

(Deposition of O. R. Daly.)

me he would have to take the matter up with his partner, Mr. Donlan; that they would not be ready to place any insurance on the mill until they were ready to start it up; that they would not be ready for any insurance on the yard until the new cut had started to come into the yard, as the lumber in the yard at that time was all insured by the former owner. I told him that we could take it up by correspondence, which we did. I first talked to Mr. Henderson as to any dealings he may have had with Turner, Dennis & Lowry Lumber Company at the time I have just told about. Mr. Henderson told me that Turner, Dennis & Lowry Lumber Company were backing their operation, but he did not state the particulars. I did not afterward learn what the particulars were, except in a general way. That conversation was with Ben Henderson about July 23d, at Pablo, Montana. I had a friend from Portland with me; I don't believe there was anybody else present; possibly the bookkeeper. The only thing that came up that I can remember was that I tried to get Mr. Henderson to put \$20,000 additional insurance on his yard stock, but he told me he didn't want to do it right then until he heard from Turner, Dennis & Lowry. It seems that they had taken a check up of the yard a few days previous to the time I was there and he had not yet heard from that check up. I don't recall the exact date of the next conversation I had with him but it was shortly after the fire and at the time Mr. Partridge was

(Deposition of O. R. Daly.)

there on the adjustment. There were present at that conversation Mr. Partridge, Mr. Donlan, Mr. Henderson, Mr. Keith and the bookkeeper. Nothing was said by Mr. Henderson at that time relative to the dealings with [265—159] Turner, Dennis & Lowry Lumber Co., so far as our case was concerned, except that they were interested, as above stated and as our forms on our policies did not necessitate absolute ownership, I did not go into the matter further.

Neither Mr. Henderson or Mr. Donlan, at that time or at any other time, told me that Turner, Dennis & Lowry Lumber Company were the sole owners of that lumber; nor did they tell me at that time that they had sold or disposed of their interest in the lumber to that company. If either Donlan or Henderson had told me, or if I had known that they had sold their entire interest in the lumber to the Turner, Dennis & Lowry Lumber Company, and given them a bill of sale for the same, and delivered possession of the lumber to them, and had no further interest in the lumber, I would not have written the insurance in the name of Donlan & Henderson except as trustees, possibly.

I did not have any conversation in particular with Mr. Donlan relative to his deal with the Turner, Dennis & Lowry Lumber Company. He was present at the time that I have heretofore testified to when I said that a number of us were present in the office and Henderson made the state-



(Deposition of O. R. Daly.)

ment that I have testified to; he took part in that conversation. I do not recall any statement Ed. Donlan made to me at that time regarding the deal with Turner, Dennis & Lowry Lumber Company, and nothing particular in my presence except along the general conversation.

Mr. Donlan did not at any time make any statement to me or in my presence relative to the firm having sold and disposed of all their interest in the lumber and given a bill of sale to Turner, Dennis & Lowry Lumber Company; I could not have made up proofs of it either if these parties had given that information. I made up the proofs of loss on the policies issued by me. I mailed them to Ben W. Henderson, Pablo, for signature. [266—160] I got them back afterward, signed by Ben W. Henderson and Ed. Donlan; I then forwarded them on to our Seattle office for payment; that is the office managed by James H. DeVeuve and Earl DeVeuve. I never had any proofs of loss signed by Turner, Dennis & Lowry Lumber Company, and no claim was ever made by them. I never issued any insurance on this lumber at Pablo in which Turner, Dennis & Lowry Lumber Company were named as the insured; nor did I issue any insurance on this lumber at Pablo in favor of that company. The payment of the loss was not made through me; direct from Seattle. I would not know when it was made or how much.

Thereupon, at 3:35 o'clock P. M., recess was taken until 9:30 o'clock A. M., of Thursday, June

9th, 1921, at which time the trial of said cause was resumed.

**Testimony of L. X. Juneau, for Defendant  
(Recalled).**

L. X. JUNEAU, a witness recalled on behalf of the defendant, testified as follows:

**Direct Examination by Mr. POPE.**

I was on the stand and sworn yesterday. There was an advance made by Turner, Dennis & Lowry Lumber Company on the old stock up there that was dry, and then on the green stock. The dry was the 2,000,000 feet. The shipments of cars were made from the old stock. On August 3d, when I made my inventory, there were some unfinished piles there. The unfinished piles, as they were made there, ran, as to grades and quality, about the same as the finished piles. The piles were made just as the lumber arrived at the mill, in the transfer, when they rigged it out. When a pile reached a certain height it was covered and a new pile of the same grade and quality started. [267—161]

**Cross-examination by Mr. PARSONS.**

I don't know exactly how many hundred thousand feet there was in the yard at the time of the fire that belonged to Donlan & Henderson, and had not been transferred to us; I haven't got the figures here; something about 400,000; something like that. As to whether there were tramways and bases and bottoms for those piles that belonged

(Testimony of L. X. Juneau.)

to Donlan & Henderson, the most of the bottoms were tallied in with the piles. We generally took the figures from the piles and checked with Mr. Rapp. The figures Mr. Rapp put on the piles I adopted, if I thought they were right, and if I didn't I would check it over.

Witness excused.

**Testimony of Thomas S. Dennis, for Defendant  
(Recalled).**

THOMAS S. DENNIS, a witness recalled on behalf of the defendant, testified as follows:

Direct Examination by Mr. POPE.

I have computed the percentage of the various grades shown on the June 28th inventory, taken by Mr. Juneau, which was offered in evidence yesterday. That inventory covers all the new lumber which had been sawn up to that date. That inventory, referring now to Defendant's Exhibit 18, reduced to percentages, shows  $12\frac{1}{2}\%$  of dimensions; 10% 4 and 5 common;  $30\frac{1}{2}\%$  3 common;  $19\frac{1}{2}\%$  1 and 2 common; 9% shop and shop common;  $18\frac{1}{2}\%$  selects and factory selects. Those are substantially the percentages ordinarily produced by a stock of lumber and timber such as that which existed there; I would say that those percentages are liberal; the selects, I think, would hardly grade that much when actually taken down out of the pile. This compilation however, is unquestionably liberal, and in connection [268—162] with this, I have tried to give the inventory all the benefit

(Testimony of Thomas S. Dennis.)

of the doubt; for instance, I have treated all covered boards and closed piles as #3 common, while it is quite likely by the time they came out of the piles they would be #4 or coarser; and in the June 28th inventory there are shown #4 dimensions, which I have treated as dimension, without throwing it in #4 grade. I would say that these percentages are substantially the averages of what you would expect from that class of timber, marketed under those conditions.

Since this case started we have been served with a new bill of particulars, marked "August 3d Bill of Particulars," which is the basis on which certain witnesses have testified before. I have examined that bill of particulars covering the lumber here claimed to have been sold to our company, outside of the original 2,000,000 feet of lumber, for the purpose of determining the percentages of the grades shown by it. Those percentages average 8% of dimension; 5% #4 and #5 common; 27% #3 common; 27% #1 and #2 common; no shop common; 1½ of 1% of shop; and 32½% selects and factory selects.

I have compared, item by item, the totals of the various grades shown on the June 28th inventory, with the same items or corresponding grades in this new bill of particulars. On the June 28th inventory there was shown 112,000 feet of dimension; on the August 3d inventory there was shown 105,000 feet of dimension. On the June 28th inventory there is shown 90,000 feet of 4 and

(Testimony of Thomas S. Dennis.)

5 common; on the August 3d inventory there is shown 66,000 feet of 4 and 5 common. On the June 28th inventory there is shown 273,000 feet of 3 common; on the August 3d inventory there is shown 359,000 feet of #3 common. On the June 28th inventory there is shown 171,000 feet of #1 and 2 common; on the August 3d inventory there is shown 362,000 feet of #2 [269—163] common. On the June 28th inventory there is shown 11,000 feet of 5/4 shop; on the August 3d inventory there is shown 8,000 feet 5/4 shop. On the June 28th inventory there is shown 69,000 feet 4 quarter shop common; on the August 3d inventory there is shown no 4 quarter shop common. On the June 28th inventory there is shown 164,000 feet selects and factory selects; on the August 3d inventory there is shown 436,000 feet selects and factory selects. Those figures are given in round numbers; any amounts less than a thousand feet are dropped. The August 3d bill of particulars, if it shows lumber on hand August 3d, which had been cut up to that time would include all of the July cut on which we had made advances which covered all of the July cut, which had gone into the finished piles. All those grades do not show increases between June 28th and August 3d.

The items of dimensions show a decrease of some 6,000 feet; the 4 and 5 common show a decrease of some 24,000 feet; the 4 quarter shop common shows a decrease of 69,000 feet and the 5/4 shop shows a decrease of 3,000 feet. The increase shows



(Testimony of Thomas S. Dennis.)

in the #3 common, which shows an increase of 86,000 feet; the 1 and 2 common, which shows an increase of 190,000 feet, and the selects and factory selects, which shows an increase of 272,000 feet. The selects and factory selects and the 1 and 2 common, which show the greatest portion of increase, are the highest grades manufactured under this operation. Those stocks or grades in which the decrease appears between the June 28th inventory and the bill of particulars, are, as a rule, lower grades, with the exception of the 5/4 shop.

As to whether, with respect to the dimension lumber there, in which there would appear to be less dimension on August 3d than June 28th, under the circumstances and with the equipment with which Donlan & Henderson were sawing there at Pablo, it [270—164] would be possible to cut logs during July without producing dimension lumber from such logs, I will say it would be physically impossible for them at that time, with the equipment they had, to saw their logs without getting a least one piece of dimension out of each log. Comparing the dimension items shown in the two inventories, I find that, taking each item of dimension, from 2x4-10 to 2x12-20, that the quantity shown on the inventory of June 28th and August 3d, were practically exact.

There are several differences in grades and varieties of shop. The inventory contemplated 4 quarter shop, 5/4 shop and 6/4 shop; 5 and 6 quarter shop are graded on grades known as #1

(Testimony of Thomas S. Dennis.)

shop, #2 shop and #3 shop. They are the more valuable varieties of shop, and of course the #1 shop is the most valuable of the three grades of shop. The 4 quarter is not graded on grades; it is simply thrown into the grade called shop common, which in common, would be in value approximately slightly above the value of #3 common, which is a lower variety or grade in value of lumber. The decrease appears in both varieties of shop between the June 28th inventory and the August 3d bill of particulars, about 3,000 in the 5 quarter and to a difference of some 69,000 feet in the 4 quarter shop. It would be difficult to state what has become of the 69,000 feet of 4 quarter shop which does not appear in the August 3d bill of particulars, so far as this inventory shows, excepting by comparing the two inventories, I find on the inventory of June 28th that there are no 4 quarter factory selects and on the August 3d inventory there are 85,000 feet 4 quarter factory selects. The difference in value between the 4 quarter shop and the 4 quarter factory selects I would estimate somewhere between \$20 and \$25 per thousand. [271—165]

The August 3d inventory treats the selects as C and better, and that August 3d bill of particulars purports to include all the new cut on which we had made our advance. The June 28th inventory, Defendant's Exhibit 18, shows all the selects were graded and inventoried as D and better. D is a lower grade than C. If a stock of lumber is

(Testimony of Thomas S. Dennis.)

graded D and better, the proportion that is D varies under certain conditions, but on such an operation as that it would run to 50 to 60% of D and 40 to 50% of C and better. That would make a difference in price of probably ten to fifteen dollars at the outside, \$20.00 per thousand, between the higher and lower grades of the selects.

Asked to state what a comparison of the June 28th inventory and the August 3d bill of particulars would show the July cut to have been, I will say, reducing it to percentages, it would indicate that of the lumber accounted for as having been sawn or accumulated there, 15½% would be #3 common, 35% 1 and 2 common, and 49½% selects and factory selects. The selects and factory selects and 1 and 2 common are the higher grades of lumber. The two percentages taken together would make 84½% of the entire amount shown to have been cut. I would say it is ridiculous to consider it possible to produce such a cut as that from any sort of timber stand.

Cross-examination by Mr. PARSONS.

I am taking as a basis this Exhibit 18, made by Mr. Juneau, as representing the June 28th inventory. There was no inventory made in April or May; we didn't enter into this contract until April 16th, and that contract was based on the 2 million and some thousand feet of the old Smead cut, of which no inventory was taken until the first inventory was made on June 28. [272—166]

I made my account as counsel asked me to make

(Testimony of Thomas S. Dennis.)

out yesterday. I said that I went from Kansas City to meet Mr. Donlan in Chicago, and had a talk with him there. It is possible that I was at the Congress Hotel in Chicago, at the time he got there from New York; but I was not there when I received the wire from him.

I can't give you the exact date I received this \$60,000 from Senator Donlan; it was sometime after the 20th of September—following that—between that and the first of October. It was either the same day I submitted our Exhibit Number 1 or the day previous to my having made this statement. That would be in the period about the last of September or the first of October.

Redirect Examination by Mr. POPE.

I stated that one car was shipped after the fire; there were no other shipments made after the fire than that one car. That was because we were waiting for authority from Donlan & Henderson to hand over their stock on the market. There was no lumber on hand after the fire except a small amount of miscellaneous items in the shed, part of which were shipped out in the car that was shipped after the fire. Of course, they started sawing again shortly after the fire and began to pile up stock, but that was all in green and unmerchantable condition for sixty and ninety to a hundred *a* twenty days after the fire. Defendant's Exhibit 21 is the letter that I sent to Donlan & Henderson on the date there shown respecting orders and shipments of cars of lumber.

Defendant's Exhibit 21, then admitted in evidence without objection, is a letter dated November 17, 1920, from Turner, Dennis & Lowry Lumber Company [273—167] to Donlan & Henderson, reading as follows:

**Defendant's Exhibit No. 21.**

“On October 30th we wrote you reference to market conditions as we found them at that time suggesting that you advise us whether or not you wished to offer your stock at present at competitive prices.

“As we stated in our letter, the Weyerhaeuser list is being used practically as a basis for making quotations although some items that are particularly plentiful, especially Fir & Larch Common and #3 Common Western White Pine are being sold in some instances at \$2.00 or \$3.00 or even \$4.00 or \$5.00 less than the Weyerhaeuser list. We do not find any great increase in trade as yet although there has been a considerable improvement in inquiries which is bound to develop into business sooner or later.

“We wish you would advise us whether or not you wish to take on any business on the basis of present competitive prices or if you prefer holding your stock awhile longer. While it is proving a very heavy burden for us to carry at this time to refrain from shipping the stock from our contract connections, yet we prefer being governed entirely by your wishes and if you feel that it is best to



(Testimony of Thomas S. Dennis.)

carry the lumber for a better market we will see you through just so long as our financial resources will permit. Selfishly we would rather ship the lumber out on to-day's market as the difference in our commission would be relatively small and it would result in releasing heavy amounts of money which we find we are very much in need of on account of the very slow collections from retail dealers a number of whom we have had to grant extensions of thirty, sixty, ninety and even one hundred and twenty days, but we want to make our connections with you just as profitable and attractive to you as possible and will be governed by your wishes just so long as [274—168] conditions will permit.

“Will you please give this matter serious consideration and let us hear from you at your early convenience.”

By the WITNESS.—We did not receive a reply to this communication from Donlan & Henderson. Defendant's Exhibit 22 is a letter which we sent to Donlan & Henderson on December 15, 1920.

Defendant's Exhibit 22, then admitted in evidence without objection, is a letter dated December 15, 1920, from the defendant company to Donlan & Henderson, reading as follows:

**Defendant's Exhibit No. 22.**

“We are addressing you at Pablo and also sending a copy to Mr. Donlan at Missoula as we are anxious that both Mr. Henderson and Mr. Donlan receive this letter.

“We have just received copies of Mr. Lowry’s letters of December 8th and 9th addressed to Mr. Donlan at Missoula with reference to the various matters at issue. We are sorry to note that Mr. Henderson did not feel justified in allowing the bill of sale to be attached to the draft as we do not see how we can consistently pay the draft unless the bill of sale is released, and if the bill of sale and the draft were sent together through the bank it would be impossible for us to obtain the bill of sale without first paying the draft, so you would be entirely protected. We judge that Mr. Henderson must have had some reason for this, but we do not understand just what it could be.

“We note by Mr. Lowry’s letter of the 8th addressed to Mr. Donlan, that Mr. Henderson had agreed to deposit the bill of sale in the bank and attach to the draft the bank’s acknowledgment and the bank’s agreement to deliver the bill of sale on [275—169] payment of the draft. This doubtlessly would be satisfactory and if the draft comes in with the acknowledgment of the bill of sale and it is so worded as to properly protect us, we judge it will be acceptable to us in that form.

“Regarding the insurance, this subject unfortunately seems to be a bone of contention between us and there is no reason in the world why it should be. Mr. Lowry has covered the matter very clearly in his letter and we really feel that you should strain a point and let us have these policies. However, if you cannot consistently do this, Mr. Lowry has suggested that the policies also be deposited in the

bank in trust and we can see no reason why you should object to this procedure. As Mr. Lowry has stated, all that we care about is to be secured by the policies in event of fire for the amount which we are entitled to and we think that this is not unreasonable.

“It seems that Mr. Henderson had suggested when talking with Mr. Lowry while Mr. Lowry was in Missoula that the policies be placed with the bank as trustee, and we judge that you will probably arrange to handle the matter in this manner and that this will probably be explained to us at the time the draft is presented. We trust that you will wire us when you forward the draft, advising us in regard to the subject of the bill of sale and the insurance policies so we may be prepared for this when the draft is presented.

“It is certainly very unfortunate that this contract should have worked out in this manner and frankly I cannot understand just what is back of it all, as I had felt that we were on very friendly terms, indeed, and we have certainly done everything that we could to protect your interests and to conform to our share of the contract in every possible way. We have advertised your products quite extensively, have loaned you money aside from [276—170] the advance, have been very prompt with our advances in every respect, have given you the benefit of Mr. Juneau’s advice and suggestions which enabled you to get a great deal more out of your logs in the way of shop lumber

and selects than you could possibly have gotten operating as you were, and in fact have done everything that we could to make our connection with you to your advantage and profit as well as to our own.

“I would like nothing better than to be able to sit across the table from both of you and talk this matter out and see what the trouble is, but it is impossible for me to get away at the present time, due to the very urgent and strenuous financial conditions with which we are confronted at home. I plan, however, to get out there just as soon as conditions will permit and want to have a heart to heart, frank and above board talk with you at that time.

“In the meantime please let us have some information in regard to wishes reference to placing your stock on the market. We wrote you on October 30th and again on November 17th with reference to placing your stock on the market at competitive prices but have had no reply from you. It has been our policy throughout this contract of being guided by your wishes with reference to meeting market conditions and while we are very anxious indeed to get our money out of this contract as well as all of our other contracts, yet it has been our policy not to insist upon the mills meeting the present low level of prices unless they are willing to do so. This has meant an unreasonable strain on us and yet we have felt that as long as we could carry the mills, that we ought to give them the

benefit of this assistance rather than force them to liquidate their stock at the present low values.

“We would like to have you write us as completely as possible, [277—171] advising just what attitude you wish us to assume towards the subject of selling your stock at competitive prices and we will be guided accordingly.

“In closing \* \* \*

Witness excused.

The Court then admitted in evidence, over the plaintiffs' objection, a writ of attachment issued out of the District Court of the Fourth Judicial District of the State of Montana, in and for the County of Missoula, in this action, directed to the Sheriff of Flathead County, Montana, dated December 20th, 1920, with the return endorsed thereon, as follows:

“I do hereby certify, That I received this Writ on the 20th day of December, A. D. 1920, and personally served the same by posting a copy thereof and also a copy of Notice of Attachment in the sawmill yard at Fletcher Spur on the 20th day of December, A. D. 1920, and levying upon and attaching the following described personal property, to wit:

“One million six hundred and fifteen thousand, seven hundred and eighty-six (1,615,786) feet of lumber, stacked and piled in the sawmill yard at Fletcher Spur, Flathead County, Montana, and which is marked or stenciled as follows, to wit: ‘Turner, Dennis & Lowry Lumber Company,’ and



placed J. E. Foss in charge as custodian, to serve without salary. \* \* \* ”

Defendant rests. [278—172]

## PLAINTIFFS' REBUTTAL.

### **Testimony of Ben W. Henderson, for Plaintiffs (Recalled in Rebuttal).**

BEN W. HENDERSON, one of the plaintiffs, called as a witness in rebuttal, testified as follows:

#### Direct Examination by Mr. PARSONS.

I have seen the instrument, Defendant's Exhibit 1, which is a statement made up by Mr. Dennis, and which he called an account stated, at the office in Pablo. Mr. Dennis came and suggested that we go over our accounts and try to arrive at an understanding as to our account. At that time I told Mr. Dennis that I was very busy and I was not acquainted with the details of the bookkeeping and for him to go in and go over this account with Mr. Rapp, who would assist him with our books, as well as what data he had, and then when they had an account taken off I would come in and look it over and then decide, and I went in, and Mr. Dennis said he would explain it to me, and he started in and I didn't understand the explanation. "Well, now," he says, "it might be hard for you to see, though," he says, "I will explain it in a different manner." He did so and I thought possibly I understood what he meant—was not even sure then—but I said, "Now, Mr. Dennis, do I understand you to mean by that that you are charging us \$5.00 as a profit on this lumber that burned?" "Well," he says,

(Testimony of Ben W. Henderson.)

“yes, it means the same thing.” Well, I didn’t know what to say; I was taken by surprise, because I never had expected anything of the kind, when I had never figured any way except that they owned the lumber, and I didn’t understand how he charged us a profit on the lumber that was burned as theirs. Mr. Dennis at that time called my attention to the contract; he said, “Did you ever read your contract?” And I said, “I haven’t read it since it [279—173] was signed.” “Well,” he says, “you ought to get that contract and read it once and see what’s in it,” and he said, “read article 8. of your contract.” I read article 8 and read it the second time. I then said, “Mr. Dennis, I can readily see the construction that you are placing on this contract, but that was not my understanding of the contract at the time I signed it; I know it was not Mr. Donlan’s understanding of the contract, and I think I have pretty good proof that you knew that we didn’t understand it to mean that.” That is, being \$5 profit in case it burned; and I said, “That was in this way: you knew that we placed \$70,000 insurance on this or \$35 a thousand insurance on this lumber at the time that we bought it and if we had expected to pay a profit in case it burned we certainly would have covered it for the extra \$5 a thousand.” That, in substance, was what was said at that time. The last I saw of it, Mr. Dennis took the account and handed it to our bookkeeper, and says, “This is for your files.” As I remember it, that was the words. That was all that was said or done with reference to that.

(Testimony of Ben W. Henderson.)

The same day or prior thereto I had received a communication by telephone from Senator Donlan with reference to these notes that are sued on in this case, and I talked to Mr. Dennis with reference to that telephone conversation. I asked Mr. Dennis where those notes were. Mr. Donlan had telephoned me that he had given him \$60,000 to apply on those notes and that Mr. Dennis didn't have the notes with him, said they were in his grip at Polson, and that when he went up the following day he would deliver them to me. He held the notes up, or what I took to be the notes—I asked him where the notes were and he said "Here they are," and he says, "I will deliver them to you when you pay this," or something to that effect, or "when you [280—174] pay the balance," or "when you pay this." That is pay the amount detailed in Exhibit 1 of the defendant, the \$36,000. He refused to deliver the notes at that time and place.

There was no mistake on my part, as far as I know, in reference to drawing this contract. I had practically nothing to do with the drawing of the contract; of course I knew that they were dealing and entering into a deal, and Mr. Donlan did this and when the contract was drawn Mr. Donlan told me the contract was ready for the signatures, and asked me to go to Mr. Violette's office, that Mr. Dennis was there, and we could read it over and complete it. I did so, and when I arrived there were there Mr. Violette, Mr. Donlan and Mr.

(Testimony of Ben W. Henderson.)

Dennis, as I remember. There was nothing said by anyone as to the transfer of this property being for security for any advances or loans that were to be made by the defendant in the case. There was nothing said at that time by Mr. Dennis or anyone else that the plaintiffs herein were sustaining the loss and damage in case of fire to the property.

The \$60,000 insurance policy was taken out with the loss payable clause to the defendant omitted—simply an oversight. When I got the insurance I was a pretty busy man up there, and to tell the truth, when I felt we should have some more insurance, I asked Mr. Rapp, our bookkeeper, to communicate with the Inter-Insurance Exchange; we were placing all of our insurance after that time with them. I am not sure whether it was gotten by written application; I am not positive about that insurance, whether it was telephoned, but I believe that in that instance it was either phoned or wired, because as a rule when I decided we needed it, I wanted it always right away, and told him we had better not wait to write for it. At any rate, I overlooked that unintentionally. [281—175]

I have figured out how much lumber was in the yard there that belonged to us at the time of the fire, and how much belonged to the defendant, that was covered by this \$130,000 insurance. There was: old yard, lumber destroyed 2,013,522 feet, insurance received \$70,000, rate per thousand feet \$34.76½, lumber owned by defendant bill of sale 2,000,000 feet less shipments 284,035 feet, leaves a balance of

(Testimony of Ben W. Henderson.)

1,715,965 feet burned in the old yard belonging to defendant, insurance  $\$34.76\frac{1}{2}$  per thousand is  $\$59,655.50$ . That is insurance due them on the old yard. Carrying out that proportion of the lumber owned by us and by them in the old yard, they would have  $\$59,000$  plus and we would have  $\$10,000$  plus, as our part of the insurance. Lumber owned by plaintiffs 297,557 feet, insurance  $\$34.76\frac{1}{2}$  per thousand, our proportion of that was  $\$10,344.50$ .

In the new yard: lumber destroyed 1,932,676 feet, insurance received  $\$60,000$ , rate per thousand  $\$31.04\frac{1}{2}$ , lumber owned by defendant bill of sale 1,338,412 feet, insurance  $\$31.04\frac{1}{2}$  per thousand  $\$41,551.08$ , lumber owned by plaintiffs 594,264 feet, insurance  $\$31.04\frac{1}{2}$  per thousand  $\$18,448.92$ . The defendants were entitled under this to  $\$41,551.08$  and the plaintiffs to  $\$18,448.92$  of this  $\$60,000$ . I have carried out my computations in typewriting in a recapitulation here. Of the total insurance the defendant was entitled to claim  $\$101,206.58$ ; the plaintiffs  $\$28,793.42$ ; total insurance,  $\$130,000$ . I have carried this out in the computations on this sheet.

Plaintiffs' Exhibit 13, then admitted in evidence without objection, is as follows:



**Plaintiffs' Exhibit No. 13.****PROOF OF LOSS AND APPORTIONMENT OF  
INSURANCE. OLD YARD. [282—176]**

Lumber destroyed ..... 2,013,522

Insurance received..... \$70,000.00

Rate per M ft..... \$34.765

Lumber owned by defendant:

Bill of sale.....2,000,000

Less shipments.....284,035..... 1,715,965

Insurance @ \$34.765 per M..... 59,655.50

Lumber owned by plaintiffs..... 297,557

Insurance @ \$34.765..... \$10,344.50

**NEW YARD.**

Lumber destroyed.....1,932,676

Insurance received..... \$60,000.00

Rate per M ft..... \$31.045

Lumber owned by defendant:

Bill of Sale..... 1,338,412

Insurance @ \$31.045 per M..... \$41,551.08

Lumber owned by plaintiffs:..... 594,264

Insurance @ 31.045..... \$18,448.92

**RECAPITULATION OF BOTH YARDS.**

Old Yard—Defendant 1,715,965 @ \$34.765.

..... \$59,655.50

New Yard       "       1,338,412 @ 31.045.

..... 41,551.08

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3,054,377 ft.       \$101,206.58

Previously paid to defendants..... 60,000.00

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Balance..... \$41,206.58

(Testimony of Ben W. Henderson.)

Old yard—Plaintiffs	297,557 @ \$34.765.	
.....		\$10,344.50
New Yard	” 594,264 @ 31.045.	
.....		18,448.92
Total .....	891,821 ft.	\$28,793.42
Defendants.....		\$101,206.58
Plaintiffs .....		28,793.42
<hr/>		
Total insurance.....		\$130,000.00

[283—177]

By the WITNESS.—In making this proof of loss to the insurance companies, introduced in evidence, the prices were fixed by Mr. Juneau, who was there representing Turner, Dennis & Lowry. The average price fixed by that is \$51.10, as I remember. I extended the prices throughout. There was nothing ever said to me by either the defendants or by Mr. Juneau, representing them, that they did not own this lumber.

I do not know anything about these demurrage charges of \$601 on the 11 cars that were shipped. I never had any conversation with Mr. Dennis, or any member of the firm, relative to what was testified to by Mr. Dennis, that it was customary for the seller to stand the demurrage, and in the second place that he had an agreement with Mr. Donlan and I, and had talked it over in my presence, and I had assented to paying that demurrage on these transit cars. We shipped our first cars along the latter part of July and the first expense account that we received was

(Testimony of Ben W. Henderson.)

right along Christmas; I couldn't tell the date, but the very last of December; the first expense bill we received was five or six months afterwards. That was the first information we had that these demurrage charges were being made against us. I never consented to it. I couldn't say whether they ever charged us any commission on these sales aside from the ones which are provided for in the contract; we have those statements which they sent us at that time. I do not know whether or not they were customary, as testified to by Mr. Dennis. I didn't expect to have to take care of any demurrage charges; that was my understanding.

When they made an advance on lumber or payment, we delivered a bill of sale to them, and when we borrowed money from them we gave a note. That method was carried on throughout our [284—178] entire transaction.

In the conversation I had with Mr. Dennis there along about the latter part of September or the first of October, when this Exhibit 1 of the defendant was made by him, he did not deny that the notes had been paid, when I told him they had. His refusal to surrender was simply based on the fact that I wouldn't acknowledge Exhibit 1 as the balance due.

We could have shipped around at least 35,000 a day on the equipment that we had there at that time. In 90 days that would have been 3,000,000 substantially. That was a single shift.

We couldn't carry the contract out on up to Jan-

(Testimony of Ben W. Henderson.)

uary 1st, 1921, because we got no orders; we received no orders from them to go ahead; we were ready at all times to ship this lumber; now, I don't know just what they are trying to get at; we didn't ship because we had no orders. They did not pay us for what we did ship; they turned down our November draft for \$13,999.44. They didn't honor our draft for that at that time. Then it ran on and they didn't order the next, or wouldn't issue a draft for the next stock. We made a draft on them, or Mr. Juneau did, for \$13,999.44, for November cut, and we gave them a bill of sale at that time; they kept the bill of sale and didn't make any payment of it; afterwards said they had credited our account with it. When the time came for the next advance they checked the yard and I refused to deliver the bill of sale to them until I had received the money, Mr. Juneau to sign the draft unless I gave him the bill of sale as we had been doing; I told him I would deposit this bill of sale in our bank in Missoula, with authority to deliver to them on receipt of the money—on receipt of payment for this; he refused, but said he would sign the draft if I would send the bill of sale on to the [285—179] Kansas City bank, which I refused to do.

Cross-examination by Mr. HALL.

They did not tell me at that time that they had placed that credit of \$13,999.44. I first learned of that when Mr. Lowry was here; he told us he had credited us with that. I told Mr. Parsons that the demurrage was to be paid by the defendant; in fact,

(Testimony of Ben W. Henderson.)

I never gave the demurrage any consideration. I did not understand that they were to pay the freight too. I didn't anticipate any demurrage.

As to whether they rendered an account of the sales as fast as they made them, I think on the first three cars, possibly, we got a record of that sale without much delay, but not the expense bill. They did make a report, Defendant's Exhibit 6, of that sale of car number 52100, to show there they paid \$231 demurrage, but we didn't receive this until the last of December, right around Christmas time; we got a sale report of all the cars; right around Christmas time we got those. I never made any objection of that to them.

I said that Mr. Juneau fixed the prices. It is a fact that what Mr. Juneau did he had the Weyerhauser list there and he said what the Weyerhauser list showed. If I may explain, we called Mr. Juneau and we wanted a man to arbitrate; that is, it was for us to make the proof of loss and we wanted some man who was better posted than ourselves on the price of lumber that day, and we asked him if he would come down from Polson and set those prices for us; that we didn't know what price to put on the lumber and he did, and I believe he took it from the Weyerhauser card; he read it off and Mr. Keith took it down. He took Mr. Juneau's figures as he gave them to him.

I made objection besides that I didn't understand this [286—180] \$5 a thousand when Mr. Dennis showed me what he claimed was the amount



(Testimony of Ben W. Henderson.)

we owed Turner, Dennis & Lowry. That was the first intimation I had that we were expected to pay that \$5 a thousand. That wasn't the first time I knew that \$5 a thousand was in the contract; I knew that there was a \$25 a thousand in the contract to be placed on them subject to their interest—as their interest might appear in the property; I knew that, which I supposed was to protect them, and the \$20 there, and any interest which might accrue from that, in case of fire; that was my understanding. That was on the old yard. I understood then that we were to carry this insurance policy at \$25 a thousand; I did not do that. As to whether I mentioned to the Inter-Insurance Exchange the fact that Turner, Dennis & Lowry had any interest at all, I will say he was familiar with the circumstances. I didn't have that in the policy or insure any insurance in their favor. As to why I said to Mr. Dennis, "Do I understand that you are charging me \$5 a thousand on this lumber?" if I knew it was in the contract at the time I signed it, I will say there were two reasons that I recall now. In the first place, I didn't understand, I didn't know my legal rights in the matter, and in the next place I didn't care to enter into any controversy until I had a chance to talk with Mr. Donlan. I said to Mr. Parsons that it wasn't my understanding or Mr. Donlan's at the time I signed the contract, that they were to have \$5 a thousand more than \$20. I didn't say that I didn't know who had suggested that article 8 in the con-

(Testimony of Ben W. Henderson.)

tract; I had nothing to do with the making of the contract.

As to the reason why I was \$35,000 underinsured, I recall that Mr. Daly, the representative of the Inter-Insurance Exchange, was there, a few days, I think, before the fire—not over a week before; he came around regularly to inspect the [287—181] yard, and he asked me to take out more insurance at that time, and told me I was underinsured, and I told him that I didn't think I would at that time, that we expected to take a little chance along with the rest of them, and couldn't give it all to them fellows, or something to that effect. I intended to take out some, but I was a little too late; I intended to take out more.

Redirect Examination by Mr. PARSONS.

At the time these price lists were made out by Mr. Juneau I had, in addition to the basic list, the monthly discount sheet. As to what I said to Mr. Dennis in regard to this \$5 profit, I told him, when he said that it was in effect \$5 a thousand, that that was not my understanding; I told him that I could see now, after reading this contract, the construction that he was endeavoring to place on it, but I assured him that it was not my understanding of the contract or the meaning of the contract at the time I signed it; I knew that it was not Mr. Donlan's understanding, and I thought I had proof that he knew that we did not understand it that way; that I did not understand that he was to be

(Testimony of Ben W. Henderson.)

paid a profit. If so, I would have insured for \$5 more a thousand.

Recross-examination by Mr. HALL.

The policies will show how long we had them in our possession before the fire; those policies were kept in the bank here in Missoula, the Missoula Trust & Savings Bank; they were in there at the time of the fire. We had got them back quite a long time before the fire. We had them in our possession; they were in the bank.

Witness excused. [288—182]

**Testimony of Ed. Donlan, for Plaintiffs (Recalled in Rebuttal).**

ED. DONLAN, one of the plaintiffs, called as a witness in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I testified before. I heard the testimony of Mr. Dennis with reference to making this contract, and the circumstances under which it was executed. I never spoke to Mr. Dennis about the contract until the morning of the 14th of April, 1920. I met Mr. Dennis in the latter part of January or the first of February at the Florence Hotel, the first time I met him and the only time I met him until the 14th of April. I met Mr. Juneau and Mr. Juneau knew I had an option from Smead on this lumber; Mr. Juneau had been up around Pablo for practically six or eight months, and he came to me and wanted to know what I was going to do with it along the early part of April. I told him that

(Testimony of Ed. Donlan.)

I had an option with a party in Spokane on a flat price of \$44—I don't know whether I told him that price, but that is what I had, and I couldn't do anything until it was up, on the 10th, I believe. Mr. Juneau came to Missoula about the 10th or before that, and I told him to get in touch with Mr. Dennis and see if they wanted this lumber, and he wired Mr. Dennis, who said he was coming to Missoula.

I met Mr. Dennis on the morning of the 14th. Mr. Juneau had made arrangements and they came to the Palace Hotel. I went up into a room there and he says, "Well now, what about this contract, this sale?" I said, "I want to sell this lumber and I want a mill—the mill run for the lumber in the yard, and what we are to cut up to January 21st, 1921, and I want \$42 a thousand." He says, "No, I won't deal that way; I won't deal on a flat price." The man convinced me; he says, "We will buy this lumber, but I will buy it this way, that we will pay— [289—183] we will go out and get the highest market price, and take 15% of it for the selling of it, and we can get you a great deal more money; you are very foolish; this is a better deal for you than selling on a flat price of \$42," and he convinced me in a short time that I thought he was right, that we would get more money, and I told him what I wanted, that the option was up on the Smead contract to-morrow, on the 15th, and that I had to pay \$60,000, and I stated there were 2,000,000 feet or over in the yard

(Testimony of Ed. Donlan.)

there, and I wanted an advance of \$30 a thousand, and \$20 a thousand on the—what we were to cut from there on to January 1st, 1921. He said, “No, I won’t advance \$30 a thousand, but I will advance \$20 a thousand on this and loan you \$20 a thousand, each, making \$60,000; but,” he says, “I have got to take this up with my people in Kansas City. I will wire them your proposition, but I want to look at this lumber first; now, how can we go out there?” When we got through the negotiations there I hired an automobile and sent him and Mr. Juneau to the mill and brought them back that night. The next morning he was well satisfied with the lumber and he got a wire from Kansas City office and said, “It is all right; we will make the deal.” I said, “We will go up to Mr. Violette’s office,” which we did, and I told Mr. Violette we wanted a contract drawn for the Smead yard, the lumber that was in there and what we were to cut between now and January, and Mr. Violette took a piece of tablet and sat down at the table. I told part of it and Mr. Dennis told part of how the sale was to be consummated, and Mr. Violette wrote it out in long-hand, took down the notes of what each one suggested, and then we were to come back after lunch. We did so, and Mr. Violette had it all revamped in a contract form, in pencil, and was typewriting it on the typewriter, and had possibly half a sheet typewritten. Mr. Violette [290—184] read this writing off the tablet, and then read what he had



(Testimony of Ed. Donlan.)

written on the typewriter. I don't remember any change made then. Then I went down and Mr. Dennis and Mr. Juneau and I went to the bank, and Mr. Dennis paid over the money, \$60,000; consummated that afternoon my deal with Mr. Dennis.

That night I called up Mr. Schlick and made an appointment with him to meet me at nine o'clock at his office to put insurance on it, and put insurance on it of \$70,000, made the policies out according to our agreement of the contract—\$25 or as their interests may appear—for \$70,000. The next morning we went out and I got Mr. Henderson, who came in there, and Mr. Juneau and Mr. Dennis and myself in Mr. Violette's office, and it was the first time Henderson had seen the contract, the first he had any negotiations about the contract; he read it over; Mr. Dennis took a copy of it, and I didn't read it over because I had read it before and knew what was in it. I said then, "Henderson, you sign it, as you sign all the checks and do the business up there; you sign the firm's name, Donlan & Henderson, by yourself." Mr. Dennis signed and got up and finally Mr. Dennis complimented Mr. Violette on the contract, and said, "This is fine; we got along here dandy," and we went down then to the bank and we gave out two ten thousand dollar notes, and on the money that we got the day before, and the transaction was closed, and that was the last I

(Testimony of Ed. Donlan.)

have seen of Mr. Dennis, I believe, until I met him in Chicago.

The only time I ever remember meeting Mr. Dennis was the latter part of January or the first of February, at the Florence Hotel. I heard his testimony. Nothing was ever said by him that this contract, these bills of sale given under the contract and in pursuance of it, were to be only in the nature of a security. Nothing was ever said that we ourselves were to [291—185] stand the loss in case of fire. These bills of sale were given because Mr. Dennis insisted, was very insistent about that provision in the contract when it was drawn. I don't know whether anybody mentioned that the words vendors or vendees ought to be put in, but it was entirely satisfactory when Mr. Violette read over the first draft of the contract—no objections then offered—none, as far as I know. The contract contains the vendor's lien clause which was put in at Mr. Violette's suggestion.

After we were discussing the contract the morning of the 15th when he was taking down the notes, he says, "Now, I think that Donlan & Henderson ought to have a vendor's lien, as you are getting absolute possession; they are giving you a bill of sale, lease of the ground and absolute possession of this lumber; they ought to have a vendor's lien for the balance due them." Mr. Dennis says, "Why certainly, certainly it is all right."

This clause 8, the \$25 clause, was put in there at Mr. Dennis' instance. I don't remember any

(Testimony of Ed. Donlan.)

such conversation as that I objected to giving him title and giving protection to the lumber first, because I couldn't trust them with the title to the property sold, and second, because we might not get the best price for it; there is nothing to that at all. This money was paid by Mr. Dennis before the contract was signed; it was paid on the 15th. Mr. Dennis did not tell Mr. Violette there, or me, that he was not to take title, but simply on a factor's or commission basis or agency contract; he never mentioned that and there was no understanding. It was a contract from the start and he understood it and I understood it, that it was a sale, because I wanted a sale and to make the sale at a flat price first, and it was a sale of the lumber and he said, [292—186] "I will buy it under those terms." There is absolutely no mistake in that contract, as far as I am concerned. The draft for the \$60,000 was drawn before the contract was signed.

In my conversation with Mr. Dennis in Chicago there was nothing mentioned along the line that I agreed to the demurrage charges, or in which I was in favor of shipping on consignments. Nothing was mentioned along that line at any place. I told Mr. Dennis in Chicago why I wanted more money, what I called him up for. I wired Mr. Dennis from New York to Kansas City that I would be in Chicago on Tuesday evening and wanted to know if he would meet me there, or

(Testimony of Ed. Donlan.)

when, and to wire me at the Great Northern Hotel. When I got there Tuesday night I got a wire from Turner, Dennis & Lowry that I would find their man Dennis at the Congress Hotel. I called there that evening about four or five o'clock; Mr. Dennis was out, but I got him later in the evening, and made an appointment for the next morning to come over to the Great Northern Hotel, and I told him what I wanted. I wanted \$25,000 and I told him the reason I wanted it was our payments were bigger and we had no orders and no lumber shipped and we had no orders for lumber when I left the early part of June. He said, "Well, I can't." I said, "I would like to get an advance of the full \$20 a thousand now on what lumber we have, and then loan me the money to make up \$25,000." So he said. "I will wire Mr. Juneau to go down there and check this up and then meet you," and he at that time said, "Now, I am—we are dividing our territory up; Mr. Turner is taking the Eastern district, New York, New England states; I am taking this and somebody else there, and we are perfecting our organization, and we will move this lumber out." And nothing was said about demurrage or anything else at that time.

I told him at that time we had no orders and no money coming [293—187] in on the lumber in the yard that was dry and should be shipped, and he said they were going to get the orders and they

(Testimony of Ed. Donlan.)

were getting their organization lined up in such shape that they would, and I think at that time I gave him the name of a man in New York that wanted to buy lumber, that I had met at that time; I know we talked of it and he was to notify or turn it over to Mr. Turner. I never consented or agreed to these transit orders made, and I didn't know there was going to be any transit orders until I went up to the mill at Pablo some time in July and found out that these transit orders with no prices fixed, and I told Henderson it was wrong and should not be shipped. I wouldn't give my assent to transit orders because you couldn't tell where they were going, and you didn't know what you were going to get for it; they might be on the road for months, which they were. I think we had four or five of those orders; I really don't know.

I had to do with taking out the first of these insurance policies for \$70,000. That was taken out with the name of the defendant in there, as their interest might appear. I didn't have anything to do with taking out the subsequent insurance of \$60,000. I don't know how that was done; all I know I have asked Mr. Henderson at different times if he was keeping himself protected, but I have no first hand information at all. There was no disposition on my part to deny and I never denied that the defendant in this case was entitled to that pro rata insurance, to cover that



(Testimony of Ed. Donlan.)

portion of the lumber covered by their bill of sale.

As to the telegram, Defendant's Exhibit 3, in which it speaks of a \$20,000 payment that hadn't arrived but as soon as it did I would forward it, I didn't do that because I wasn't here, and afterwards the draft come to Mr. Henderson and he just [294—188] put it in the bank here to his credit, so that wasn't ever paid. I had a telephone from Mr. Juneau and a wire from Mr. Dennis asking for this, saying that it had left, I believe, and I know I hadn't received it for it hadn't come to the bank.

These notes that we gave the defendant in the case were paid by us. They were paid on September 29th. Mr. Schlick notified us that there was \$10,000 there on the \$70,000 of insurance, and that the rest would be there along in a day or so, or there was one policy—I forget just—but anyway the money was paid and the insurance. I came in here and along about, I think, the 17th or 18th of September, from my operations on the Jocko, and met Mr. Schlick, and he said that the money was in the bank. Mr. Dennis and Mr. Juneau drove in here from Camas Hot Springs on the night of the 28th, the next morning, the morning of the 29th, we went up to the bank and we had to sign the policies; he signed them and I signed them for Donlan & Henderson; Mr. Keith gave us a draft for \$60,000. "Now," I said, "this pays our notes

(Testimony of Ed. Donlan.)

in addition to—and,” I said, “where is the notes?” He says, “They are up in my grip at Polson in the hotel; we are going up now as soon as we get through with this transaction, we are going back up there, and I will be down to see Henderson, and I will bring the notes down either this evening or tomorrow and turn them over to Mr. Henderson.” We never got those notes back, and I telephoned Mr. Henderson that day the results of my conference with Mr. Dennis, that I had paid him this money and that he was to deliver the notes to Henderson when he came down there. This \$60,000 was paid on September 29th.

I was in the lumber business also with Hoyt; we had a small cut there. That lumber wasn't nearly as good lumber as we manufactured here; it was smaller and shorter, more limbs; [295—189] when we took that over the mill was defunct; we took it over from the bank down here, and there were six or seven hundred thousand feet of them logs cut and they were stained at that time, and the cut as a general proposition a'n't nearly as good a stand of timber as what Donlan & Henderson had. I sold that for \$23 in the yard, and the Bradford-Kennedy had to haul that six and a half or six miles, and then we put it through a planer under a contract of \$3.50, making \$26.50 a thousand.

We didn't complete our contract to the first of the year because they hadn't paid us in full according to the terms of the contract; in the first place, we

(Testimony of Ed. Donlan.)

were to draw on them for the lumber shipped, and we drew on them and they told us not to draw on them any more, and they had never made a remittance on lumber that was shipped in July, except what we drew on them, and then they turned our draft down, and the October cut, and they wouldn't sign a draft unless Mr. Henderson would sign a bill of sale and send it to a Kansas City bank. They never paid us anything for this lumber that was burned.

I heard Mr. Lowry testify here that he had a conversation with me. Mr. Lowry came in here and I believe I met him in Violette's office—I don't know—yes, Mr. Juneau was along—in the morning, and got to talking about a settlement, and he wanted a statement of something, and Mr. Keith and Mr. Henderson and Mr. Violette were all there, and it was agreed we would work out a way on a settlement, and he was demanding the insurance money from us, and told us then that they had credited up this thirteen or fourteen thousand dollar draft that they turned down; that was \$13,999.44. He told us that morning that they had given us credit back there on the advance. So Mr. Keith went to work and got up a statement, see if there couldn't be any arrangements made of the difference, and we [296—190] were to find out how our books should compare with Mr. Lowry's. They were to meet that afternoon, Mr. Keith was, and I went back to my operation up on the Jocko, where I was building a railroad, and I told Mr. Violette to go down with

(Testimony of Ed. Donlan.)

Mr. Henderson and meet Mr. Lowry that night at the Florence Hotel, and he would represent me. They didn't come to any terms down there, as I know, or anything. The next morning Mr. Keith came back and Mr. Henderson went up to Pablo, and Mr. Keith told me that Mr. Lowry was very disappointed. \* \* \* That was the last of it that time until the following night, and then Mr. Lowry was wanting to meet me the next night, and that he was waiting over there, and that I should go into Missoula and meet him. I came into Missoula that night and I went up to Mr. Violette's office and called Mr. Lowry at the Florence Hotel, and I said, "I'm up here at Mr.—you want to see me?" And I said, "I'm here at Mr. Violette's office and will you come up here?" "Well," he said, "I don't like to go into a lawyers office." "Well," I said, "you either come here or I will go down there; but if I go I will take Mr. Violette with me." "Well, then," he said, "I will go up there." So he came up there, and I had got the proposition that he had put up the night before, on a basis that this \$5 a thousand profit, that they were asking for on the burnt lumber, as an arbitration provided by some association of lumbermen back there in Kansas City, or Missouri, some of those lumber associations, retail companies or wholesale, I don't know which—but they were backing him there to adjust this difference, and I said to Mr. Lowry, "The first thing I want to tell you now is that I will never pay the \$5 a thousand profit; I will never stand for arbitration, and if we

(Testimony of Ed. Donlan.)

can, this other difference, if we can get the money I might undertake to do that; I have already wired to see whether I can [297—191] get some money; I will talk then, if I can get it; I will see then if we can make a settlement on that." He says, "Well, I don't want to come back here." I said, "There is no need to come back here; Mr. Violette or someone—we can settle over there, whatever you want to do." He said, "I want to go to Spokane; I got to go," he says, "I am going to-night." I said, "All right, you let me know." I told him I would let him know on Saturday.

I never made out the statement of the balance due between us two. I signed these proofs of loss, exhibits in this case.

Cross-examination by Mr. HALL.

In that talk with Mr. Lowry I did not see this statement that he had, showing that we were indebted to him in the sum of forty-four hundred and some odd dollars, exclusive of the insurance. I did not see the statement in which our auditor, Mr. Keith—the lead pencil statement here—in which he shows that, not taking into consideration the insurance, our firm was indebted to Turner, Dennis & Lowry in the sum of \$1100. Mr. Keith told me that. He didn't tell me that at that time up there; he just told me without any discussion or anything that was about the way it would stand.

My relations with Mr. Violette were nothing more than that Mr. Violette had done a little business for me, looking after my ranch down here at French-



(Testimony of Ed. Donlan.)

town or something like that, and looking after taxes and that kind of stuff. He has not been in my employ at all; if I have something to do along those lines I go up and see Mr. Violette to do it, and then he puts in a bill. He does not keep any books for me. When we came to draw this contract I went to Mr. Violette because I was in the habit of doing business with him; I went to Mr. Violette [298—192] for more than that; Mr. Violette, I always considered him as safe, and would attend to it, and had the time, and would take the time, and do it.

When I talked with Mr. Dennis about what our agreement was to be, I didn't object to this \$25 a thousand insurance. I knew Mr. Violette had put that in the contract. I first objected to that when they came in and demanded \$5 a thousand profit after we losing the lumber, after sustaining our loss, they demanding their profit before we were getting anything. It would be all right if they paid us for the lumber in the first place and then took their profit; I wouldn't have objected to it. I understood every part of that contract fully.

We had the policies from the Inter-Insurance Exchange in Keith's bank; all the policies were put in there; Mr. Henderson put them there. My understanding they were the same as the other policies when they were issued; they were there, only the time after the adjustment we had to sign them and take the policies up to be turned over at the time of the adjustment.

I said to the Court that when this agreement was

(Testimony of Ed. Donlan.)

made between myself and Mr. Dennis I made him a proposition to buy this lumber at a flat price, and he refused to do it. He said he would make me a lot more money on the basis of advancing me \$20 a thousand and then selling the lumber for the highest market price, retaining 15% as his commission for selling it, taking out the \$20 a thousand that he had advanced me, and the expenses, and turning the balance over to me, than on a flat price. As to whether I agreed that he was to do that—he bought the lumber, and would take as his profit 15%, that he was to advance me \$20 a thousand, then sell the lumber, take out the cost of the lumber, take out his 15% and the 2% discount, and the balance was to go to me; I will say that [299—193] the agreement was just as I understood—was just as the contract states it.

I did not tell Mr. Parsons that I did not know about this consignment business. I objected to it; I meant I would find out about it. I do not know that Defendant's Exhibits 23 and 24 were sent by our firm. I first knew that they were sending cars on consignment some time in July, and that was being done by Henderson.

Defendant's Exhibit 23, then admitted in evidence without objection, is a Western Union telegram, dated Aug. 3, 1920, from Donlan & Henderson to the defendant, reading as follows:

(Testimony of Ed. Donlan.)

**Defendant's Exhibit No. 23.**

“Loading Item Number One in Car U P 10896  
Second Car On Order T-701 G In Car Penna 558814  
And Order Your Wire Of Fifth Date In Car U P  
78654 All Western Pine.”

Defendant's Exhibit 24, then admitted in evidence without objection, is a Western Union telegram dated Aug. 6, 1920, from Donlan & Henderson to the defendant, reading:

**Defendant's Exhibit No. 24.**

“Disregard our wire shipping advice of August third except order 1 seven naught one G shipped car Pennsylvania Five Five Eight Eight One Four have loaded car U P Seven eight six five four approximately twenty-five thousand feet four inch and wider number three S two S food assortment of widths and lengths four thousand feet number two eight inch shiplap three thousand feet four inch and wider selects S two S two thousand feet S four S selects wire immediately shipping instructions.”

By the WITNESS.—He had been sending them out that way on consignment, but [300—194] I objected to it. I didn't know it up to that time, and this order was in and was accepted by him when I was up there. By him, I mean Mr. Henderson.

Redirect Examination by Mr. PARSONS.

By saying that I wouldn't object if he had paid us for our lumber first and then taken out their profit, I meant taking the \$5 a thousand—taken

(Testimony of A. J. Violette.)

his profit of \$5 a thousand out of the lumber that burnt. I mean if he paid us for the lumber burned we wouldn't care how much he deducted.

Witness excused.

**Testimony of A. J. Violette, for Plaintiffs (In Rebuttal).**

A. J. VIOLETTE, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is A. J. Violette; I am an attorney at law and have practiced since 1895. So far as professional relations are concerned, I have been doing some work for the firm of Donlan & Henderson off and on, drawing contracts, and brought one or two suits that were never tried.

I know Mr. Dennis; I first met Mr. Dennis on or about the 15th of April, 1920. It was around nine o'clock in the morning when I got to my office; they either got to my office before I did or I got there shortly afterwards; at any rate he was with Senator Donlan and Mr. Juneau; they came to my office and I think it was Mr. Donlan spoke up—I wouldn't be sure of that, but that would be my best recollection. He says, "We want you to draw a contract for us," and I says, "All right," got out a tablet or some loose leaves there that I had in a [301—195] tablet, and proceeded to get the terms of this contract. The terms were given to me by Mr. Dennis on behalf of the Turner, Dennis & Lowry

(Testimony of A. J. Violette.)

Lumber Company, and some suggestions, probably, from Senator Donlan, and I took those down on notes, and when that was done I told them it would take me some time to go over this contract, as I wanted to prepare it carefully, and that they should come in the afternoon, and if I had it ready they could sign it then, and if I didn't they would have to wait until the next morning, and, as I say, I took the specifications from the contract they wanted drawn, and they afterward returned and came back in the afternoon. I had it written out in longhand entirely and had it partly typewritten. I was writing it—had no stenographer—and was typewriting it myself. So we went over the contract; it was read then by Mr. Donlan and Mr. Dennis, and I read it very likely for the benefit of both of them—it was my own typewriting—and also showed them what I had already typewritten, and I told them that very likely I would finish it that evening and it could be signed the first thing in the morning. The next morning they came back, the same parties along with Mr. Henderson; they took the contract and read it over carefully; I don't know if Mr. Dennis read it over; it is my recollection that Mr. Juneau read a copy; I had it in triplicate; he read the other copy, and I think he turned over the extra copy to Mr. Henderson; at any rate I know he had read it over carefully, because he had been there once before, and the contract was then and there agreed on, and this particular bill of sale was in the



(Testimony of A. J. Violette.)

contract for 2,000,000 feet sold out of Smead's yard, and that was signed.

The first bill of sale of even date with the contract, conveying 2,000,000 feet from the old Smead yard, both have a [302—196] vendor's lien, reserving to the grantors and vendors, because Mr. Dennis emphasized in speaking of this contract certain features of it, the feature of the proposition of delivery and that the title should pass, and after I noted that down I suggested that inasmuch as they were getting complete possession of title to this property it would probably be wise for Donlan & Henderson to have a vendor's lien for the balance of the purchase price, and Mr. Dennis readily agreed to it; and so it was put there that way and inserted in the contract, tending to preserve a vendor's lien as between these parties; and then I incorporated the same thing in the bill of sale except in that instance I made it as short as I could, and I referred to it as vendor's lien, and used that again in the bill of sale, and reserving a vendor's lien, whereas in the contract I stated more at length having the same effect, and that is the reason it was put there; it was consented to by Mr. Dennis. Nothing was said to me or in my presence by Mr. Dennis or anyone else about this bill of sale being merely a matter of security, a mortgage for money. Nothing was said at that time that the plaintiffs should stand the loss in case any fire should occur; the only provision raised to the insurance was this provision and I never discussed that; I put that in

(Testimony of A. J. Violette.)

there just the way as they told me and I think there was no discussion at all. I carried out absolutely what I understood to be their contract. After the contract was finished Mr. Dennis was thoroughly satisfied with it, fully satisfied, left the office in very good spirits, said the contract was very well drawn, in fact complimented me on drawing the contract, stated that he had been drawing contracts himself and it was a much better contract than he had been drawing himself. He didn't state how he had been drawing these contracts, but he said this was preferable [303—197] to the ones he used to draw; that is, in the way it was set out.

There was no effort on my part to take advantage of either party in behalf of the other in drafting this contract; I never did discuss the features; I let them dictate their own terms; I wasn't making the contract; I was simply carrying out what they told me, and the only suggestion was about the vendor's lien. Mr. Dennis emphasized the matters in regard to title, that he wanted the title to pass, and that's the reason he wanted incorporated in there that we should sublease or assign our leases to him, of the land on which this lumber existed, and as I understood that—we discussed the matter of those leases, and found out that part of the land and not all of it was simply under a verbal lease which was about to expire; my first impression was to get the lease and make a transfer, and found that couldn't be done, so I put a provision, a paragraph by itself, that this contract was an assignment, a lease, but

(Testimony of A. J. Violette.)

I put another provision that of course the plaintiffs in this action would have the use of this for the purpose of carrying out this contract; I still reserved a little right in the leased land for them so they could carry out the contract.

The clause in the contract that provides that in case of a failure of the parties to carry out their portion, the defendant should have the right to use the machinery or the planer, was suggested by the parties—I wouldn't say which it was, Mr. Dennis or Mr. Donlan—it was gone over and incidentally put in the contract, and I put it there as I understood it. The question concerning the right of possession of the property and delivery of the property arose in the same way as these matters concerning the title that I have just testified to. Those all arose at the special instance of Mr. Dennis; he [304—198] was very emphatic about those points, about the possession and delivery and ownership, and those bills of sale, and the assignment of the lease; those four features he was emphatic and he outlined it—the assignment of the leases, the delivery, possession and title and the bills of sale; they were all carried out as he wanted them.

I was later present at a conversation had between Mr. Lowry and Mr. Donlan, with reference to their business. The first time Mr. Lowry came to town it is my impression he came to my office with Mr. Donlan, and I think possibly Mr. Juneau was present, with reference to compromising or settling this whole difficulty, and he had prepared at that time

(Testimony of A. J. Violette.)

a statement that he had gotten from Mr. Dennis, I think, and he suggested that Mr. Keith and I figure out the financial transactions between these parties. Well, it would take some time to do that, so in the afternoon Mr. Keith and I did figure out the financial transactions with reference to this contract, including not only the subject matter of the first cause of action in this complaint, but the whole transaction, including this whole contract, up to that time, including advancements made after the fire for lumber in the yard; so we started to complete that and as Mr. Lowry stated it was delayed and took longer than we figured; in fact, we didn't get time to even figure the interest, so we were to meet again, and it was postponed until we could get that statement out, and that didn't occur until some time that evening, and that evening I went to the Florence Hotel with Mr. Keith and Mr. Henderson; Mr. Donlan was in the meantime called out of town and went back to his project on the Jocko; and we met with Mr. Lowry that night and discussed those figures. [305—199]

The next meeting was the meeting held at my office before Mr. Lowry left in the evening, just shortly before train time, in which Mr. Donlan called him from my office, and Mr. Lowry came up, and I think likely he had this statement we had prepared with him at that time, although I don't remember that statement was discussed; but at the meeting at the Florence Hotel there were two

(Testimony of A. J. Violette.)

propositions made, one for arbitration, as Mr. Lowry had suggested that this matter might be arbitrated if they couldn't agree—that is, the matter of the \$5 insurance they wanted to arbitrate—and Mr. Henderson told him he would have to consult Mr. Donlan. That was one of the propositions, and also the proposition as to what stand they would take on the \$5 insurance they were claiming; so that was the two principal matters of discussion between Mr. Lowry and Mr. Donlan in my office that night, and in fact they were there a very short time; Mr. Lowry wanted to take a train and was in a hurry, but Mr. Donlan told him that as to the proposition of the \$5 bonus of insurance he would never consent to pay, and that he wouldn't submit the question to arbitration under any circumstances; that was the first thing that was settled in that conversation. Then Mr. Lowry made Mr. Donlan a tentative proposition to this effect, that if they did arbitrate the \$5 a thousand, that when Donlan & Henderson paid in cash the balance which they claimed, being in the neighborhood of \$36,000, and, as I say, included the transactions since the fire—there was \$18,000 paid there. Mr. Donlan then told him this, that he had wired for money, that he would possibly hear from that in two or three days or so, and told him that when he got an answer from that he would let him know; but he says, "I want it distinctly under-



(Testimony of A. J. Violette.)

stood, Mr. Lowry, that I am not accepting your proposition to compromise by telegraphing for this money; if I do get the money I will take it up with you, or I may not, but [306—200] I am not accepting your proposition.” I didn’t understand Mr. Lowry to make a definite proposition either; he said he was making a tentative proposition, if we would do so and so will you do so and so, and Mr. Donlan said simply, “I have wired for money, but I don’t want this to be construed,” or words to that effect, “that this is an acceptance of this proposition, but I will take it up with you.” In the course of that conversation Mr. Donlan suggested that if this proposition was taken up after he got his advice from the east on this money, that Mr. Henderson might go to Spokane to settle this thing with him, and he would not have to go back. He shook hands, we all shook hands, and Mr. Lowry went out to take his train. That is the best of my recollection of what happened.

Cross-examination by Mr. HALL.

I don’t know whether Mr. Lowry said at that time to Mr. Donlan that in their business whenever they had any misunderstanding or disputes with their people it was their custom to withdraw and “you give us back what money we are in here and we will withdraw and quit”; I know Mr. Lowry wanted to do that. He said, “Return us the money that we have put into this proposition and we will withdraw and let you contract with

(Testimony of A. J. Violette.)

somebody else"; that is what he wanted done; he wanted to settle the whole proposition and be released for this contract entirely. I think he mentioned Mr. Dennis too, because he wasn't here when this contract was made; I think he made the suggestion, "if there is any dispute over that part of it I will go back home and send Tom Dennis out here to settle with you."

I don't *know suggested* about figuring up this statement that Mr. Keith made; the suggestion was made by the parties there; it was simply a question of figuring what money, the [307—201] financial transactions between the parties; that is what I understood, as to the arrangement they had with the others, and Mr. Lowry, I think, had the copy that Mr. Dennis had presented to Mr. Henderson. Senator Donlan wasn't there that night; we adjourned in the afternoon; he had to go back on the Jocko and left that afternoon while we were figuring on the statement. He went to Arlee.

Witness excused.

**Testimony of Frank P. Gray, for Plaintiffs (In Rebuttal).**

FRANK P. GRAY, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Frank P. Gray; I live at Polson, and am in the hotel business there; I have been

(Testimony of Frank P. Gray.)

there sixteen years. I was there in September of last year, 1920. I keep a register at my hotel. I know that Thomas S. Dennis was there in September, 1920. Looking at the hotel register of September 24th, I see that he is registered there on that date at my hotel. Mrs. Dennis and Mr. Juneau were with him. I know personally that he was there at that time.

Witness excused.

**Testimony of Welling Rapp, for Plaintiffs (In Rebuttal).**

WELLING RAPP, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Welling Rapp; my business is that of bookkeeper for Donlan & Henderson; I was there about a year. I was [308—202] there the latter part of September, 1920, when Mr. Dennis prepared and submitted to Mr. Henderson his Exhibit No. 1 in this case, wherein is shown to be, according to Mr. Dennis' figures, a balance of about \$36,000 due from plaintiffs to defendant. Mr. Dennis came in the office and desired to check over the accounts in order to make up a statement of how they stood, and he took our books and compared a good many instances, and in a good many instances there were items that I didn't

(Testimony of Welling Rapp.)

have—their freight items I didn't have a record of—and in that way Mr. Dennis made out a statement; and after we were through he asked me if I wanted Mr. Henderson to see it and I said yes, and I called Mr. Henderson and he looked over the statement. There was no agreement made between them there that day that it was accurate and correct. After the statement was returned to Mr. Dennis it was handed to me, but there was a discussion about a certain part of that statement. He handed it to me and said, "This will be your record," in substance to that.

Mr. Henderson there asked for some notes that Mr. Dennis had; it was some notes that had been paid in Missoula here, and Mr. Dennis said he had the notes and took them in his hand and held them up and said that he would turn those notes over to Mr. Henderson when this was settled—that is, the statement that was there. Mr. Dennis said to Mr. Henderson, after holding the notes up, "I will give you these when this," Exhibit 1, we will call it, "is settled," that statement that was made out at that time, and the one that he told me to keep for my record.

I remember the time the report was made to the insurance companies, fixing up the proofs of loss. Mr. Juneau figured and fixed the prices at that time, and Mr. Keith assisted him [309—203] in doing so; I was there, in and out.

(Testimony of Welling Rapp.)

I know how this insurance amounting to \$60,000 was placed on the yard; it was in several different policies and they were requested for that insurance from time to time; as the increase was taken up we wired in; that is, the message was telephoned to Missoula. I did the telephoning and made the arrangements for the insurance. As to how it happened that the name of the defendant in this case was not inserted in them, I had no instructions to that effect; that is, nothing was said. I just took out the insurance from time to time as I thought it was necessary; I had no instructions, one way or the other, in regard to it. I telephoned from the mill office to Missoula and then I would follow it up by letter; we had no telegraph office down there; I wrote the letter the same as I transmitted the message, without any instructions, specific instructions.

I remember a controversy arising there between Mr. Dennis and Mr. Henderson with regard to a \$5 item; that was one part of that statement that I knew nothing about and apparently Mr. Henderson didn't; he asked Mr. Dennis about it and Mr. Dennis referred him to the contract, and asked him if he ever did read his contract, and Mr. Henderson asked me to get the contract from the safe, which I did, and he either read it or I read it, I don't remember which, and Mr. Henderson stated that he could understand how such an interpreta-



(Testimony of Welling Rapp.)

tion or construction might be put on some certain clause—I don't remember which—but it was regarding the additional \$5 that is spoken of in this trial.

Cross-examination by Mr. HALL.

He said that was the first time he knew that was there. [310—204] And he was surprised when Mr. Dennis said it was there and he was expected to pay it. As I remember, I ordered all the insurance I ordered from Missoula; I telephoned it to Missoula. That was to the Inter Insurance Exchange; it was to the Western Union; you see, we had no telegraph office; I telephoned my telegram.

Redirect Examination by Mr. PARSONS.

I got the insurance through Mr. Daly, at Spokane. I telephoned my message here to the Western Union and they telegraphed to Mr. Daly at Spokane.

Witness excused.

**Testimony of R. R. Hoyt, for Plaintiffs (In Rebuttal).**

R. R. HOYT, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is R. R. Hoyt; I am in the lumber business, and sold some lumber to the Bradford-Ken-

(Testimony of R. R. Hoyt.)

nedy people last year. This lumber was located about five and a half miles southeast of Pablo. I was a partner of Senator Donlan. I am acquainted with the character of lumber, both in our yard, that was sold, and the character of the lumber that was in the Donlan & Henderson yard that was burned. I am not familiar with the lumber in the yard. As to whether there was any difference in the character of the timber from which the lumber was cut that we sold to the Bradford-Kennedy people, and the character of timber from which was cut the lumber in the Donlan & Henderson yard, I will say when we bought this stumpage the logs, there were about six or seven hundred thousand which was old logs scattered [311—205] in the woods, and they were badly stained and wouldn't make good lumber. The lumber manufactured from that would be stained lumber. Altogether we sold five million feet to Bradford-Kennedy, of sawed lumber.

Cross-examination by Mr. POPE.

The total contract covered five million feet; this six or seven hundred thousand was stained; that is, the logs cut in the woods there, about six or seven hundred thousand.

Redirect Examination by Mr. PARSONS.

As to how the logs we sawed up compared with the logs of Donlan & Henderson, for the timber,

(Testimony of R. R. Hoyt.)

the nature of the timber, that is, comparing the timber, I would say the timber below was better quality of lumber than my timber; my timber was more short and scrubby; their timber was down in the creek, and five or six log trees, while mine was short and couldn't make the lumber.

Recross-examination by Mr. POPE.

In other words, theirs were larger logs, better grade of stuff; it would cut out better and be better quality of stuff.

Witness excused.

**Testimony of I. R. Keith, for Plaintiffs (In Rebuttal).**

I. R. KEITH, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Irnie Keith; I am bookkeeper for Mr. Donlan, and have been with Mr. Donlan 18 or 20 years. I was there at [312—206] Donlan & Henderson's camp at Pablo, in 1920. I priced the proofs of loss to the insurance companies after the fire on August 3d, 1920, from figures given me by Mr. Juneau. The prices were given me by Mr. Juneau from this price list. That was gotten out by the Western Pine Manufacturers Association, current price list of western pine and Idaho white pine. I have a list of the prices reached for

(Testimony of I. R. Keith.)

this lumber at that time. I never averaged it. That has already been introduced in evidence; it was \$51.09. Mr. Juneau got the price list I hold in my hand from Mr. Flanagin, who is the gentleman who runs the planer and who testified here before. I was not present at a conversation between Mr. Dennis and Mr. Henderson the latter part of September, 1920, involving this contract.

Witness excused.

**Testimony of J. P. Lansing, for Plaintiffs (Recalled in Rebuttal).**

J. P. LANSING, a witness recalled by the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I am the same J. P. Lansing who testified before in this case. I should say the difference in this community and in this state between the sale of lumber in bulk and the sale of lumber by a specific order in cars, so far as relates to the market price or the highest market price of that lumber, was \$5 per thousand less in bulk. That is because the man that buys in bulk doesn't have an order for the stock which he buys and is taking more or less of a chance in marketing the stock after he buys it, whereas specific carload purchases are always disposed of, and there is no question as to what the seller expects to get for it.

In my experience of about 35 years, I do not

(Testimony of J. P. Lansing.)

know of any [313—207] custom that prevails here in the shipment of a transit order, that the seller shall pay the demurrage or the reconsignment fee, because transit sales are not recognized as a legitimate sale. That is because the man who handles transit sales takes a gambler's chance as to what he will get out of his stock after he gets it in transit.

One witness having testified that after February, 1920, there wasn't any market for lumber, and another that there wasn't any market after August first, I can state that the Polleys Lumber Company sales ran a little irregular during the year according to the amount of dry stock on hand; we sold and shipped the most in April, the next in March, the next in August, the next in June, the next in July, the next in May and the next in September. We shipped more in August than we did in June and July.

It having been stated that the market was demoralized in a measure by a 30% reduction by the Weyerhauser people, who issued a discount card along in the spring of 1920, I will say the first part of February, for some reason, the Weyerhauser Sales Company issued an extremely high list which was a great deal higher than the market and a great deal higher than the average firm was asking for their lumber, and then, for reasons best known to them, they reduced their prices in



(Testimony of J. P. Lansing.)

about two or three weeks, and went before the public with the statement to the effect that they had reduced prices 20 or 30%. That price they reduced 20 or 30% was not on all items. I don't know as I could specify the exact grades, but my recollection is that they made practically no reduction on the better grades, but their principal reduction was on the lower grades. [314—208]

✓ Cross-examination by Mr. POPE.

The issuance of the Weyerhaeuser card which stopped the rise in the market. I would say stabilized the market. It had been going up before that time on some, if not all, of the items. I can't state what the average drop in the market value of lumber was between August and December 31st, 1920. I don't think I ever made any comparison or figures that would justify a statement to that effect. Even though there was a knowledge of the price, the workings of the market in the early part of 1920 were so much better than from August to December 31st because the conditions of the market were so different. Up to practically the first of September the conditions were stable and normal and going along on practically an even keel, and therefore it was not necessary to make any figures so as to arrive at the average price, but after that there was more fluctuation, commencing October, November, later in the year. There was not a decided fluctuation as early as

(Testimony of J. P. Lansing.)

August. The way you put the question, I would say there was not a very decided fluctuation during the latter part of the year, at least during the year 1920. I would say there wasn't any particular drop until after October. After October there wasn't as much a drop in the price as there was in the demand; there was dropping off in opportunity to sell.

Redirect Examination by Mr. PARSONS.

There was no reduction in our prices in August over June and July.

Witness excused.

**Testimony of E. H. Polleys, for Plaintiffs (In Rebuttal).**

E. H. POLLEYS, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as [315—209] follows:

Direct Examination by Mr. PARSONS.

My name is E. H. Polleys; I am president of the Polleys Lumber Company, and have been in the logging and lumbering business 48 years. We handle about 25 million of lumber during the course of a year. I am acquainted in a general way with the market valuations of lumber throughout this country. I have been connected with the sales department only in a general way, overseer; Mr. Lansing has charge of our sales department entirely. Prior to that time I myself used to be a salesman. I was connected in that capacity with the Anaconda

(Testimony of E. H. Polleys.)

Copper Mining Company for four or five years—from 1900 to 1904.

I will say the difference in the market value of the sale of lumber when the specific yard of lumber is sold in bulk, a yard of three million or more, and when it is sold on specific order by carload lots or trainload lots, is \$5 a thousand.

I have never known of any custom in this country, in my experience of a great many years by which a seller on a transit order pays the demurrage and reconsignment charges; I never have paid it; I have had several men try to work it, but they never have so far as we are concerned; there is no custom to that effect. We very frequently in our business market transit orders. When we sell a car to a man for transit order when the lumber is loaded into that car it is his lumber; if he delays it in transit or to destination that is his own risk. Last year it wouldn't have taken very long, under existing freight rates, for demurrage charges to eat up an entire cargo of lumber.

The Weyerhaeuser Company are the biggest lumber dealers in the United States. The prices that they fix have an effect on the market or the prices chargeable by other people; you have [316—210] to meet them in competition. I recall that in 1920 they raised their prices early in the spring, but I couldn't tell the percentage; it was called a big raise. They afterwards changed that schedule to a degree, but I couldn't tell you the percentage of that. The reduction that they made was largely

(Testimony of E. H. Polleys.)

on common stuff. I have no knowledge as to whether the reduction price was lower than the original price from which they had raised.

Cross-examination by Mr. POPE.

We absolutely refuse to sell lumber to a man that puts transit car on it. In case, however, we were to sell a car in transit, and in case we decided we would sell such car in transit, through an agent representing us, we would expect to pay the demurrage, if he was our agent and we were paying him a salary. If he were selling on commission, we wouldn't sell it that way.

Our company cuts and markets its own lumber. We are not at all in the business of buying lumber that is manufactured by other persons. Mr. Lansing, who testified here, is connected with our company.

Redirect Examination by Mr. PARSONS.

In our experience we have bought lumber from other people; back before we manufactured ourselves we were in the jobbing business ourselves, wholesale and retail.

Recross-examination by Mr. POPE.

That was ten years ago.

Witness excused. [317—211]

**Testimony of W. C. Lubrecht, for Plaintiffs (Recalled in Rebuttal).**

W. C. LUBRECHT, a witness recalled by the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I am the same W. C. Lubrecht who testified before. I testified that the Anaconda Copper Mining Company, during the period covered by the examination yesterday, followed in its sale prices the schedule fixed by the Weyerhauser people. There is a usual, ordinary measure or standard of difference between selling a yard of that size and proportions at wholesale and at retail; there would be a difference in selling a yard in bulk and selling a car as it would be ordered. As to whether I can fix it either by percentage or by dollars and cents per thousand, I have no recent experience in that, but a couple of years ago I sold a couple of broken stocks or small stocks at portable mills at from five to six dollars a thousand less than the relative prices for the same items as ranked in the price list. That would not be the difference ordinarily between wholesale and retail; the usual difference wouldn't amount to more than \$1.50 a thousand, that is, in the car trade.

I am quite familiar with the course of the Weyerhauser Company's basic list in the spring and summer of 1920. They raised their prices on February 11th; that was the last raise, up to the peak as we called it, and on February 22d, I think it was, they had this voluntary cut. I couldn't give you the per cent cut



(Testimony of W. C. Lubrecht.)

that was; I could give you the items per thousand feet on some of the grades. I think the reduction was about the same as their previous raise; I think they just kept about the way they were as stated in the early part of February. The character of lumber on which this raise and reduction was made was all of it plain; both high and low grades were affected. [318—212]

I know of no understanding at all by which the seller pays the demurrage and reconsignment charges in connection with transit sales; I have never sold anything in transit in my 25 years' experience; it is something we avoid entirely. The uncertainty of making the sale and having the value of the product eaten up in demurrage bills doesn't look to us like sale business.

It having been testified by one witness that after February, 1920, there wasn't any market for lumber at all, and by another that after August first there wasn't any market for lumber in this country, I will say I had no difficulty in selling all the lumber we found it physically possible to handle through our mill from the time we had lumber in shipping condition in May until the latter part of November. On October 4th we made a price reduction and also in the latter part of December, following the market as we found it; we had no change in price between February and October that I recall.

Cross-examination by Mr. POPE.

Our company has just myself and a stenographer,

(Testimony of W. C. Lubrecht.)

you might say, in charge of the sales and handling the sales. We handle our own timber from the time we cut it until the time we sell it. We buy some in small outfits; we buy timber for the mines and also the side cut which we have to market elsewhere. About 50% of the product would go to the mines and 50% we have to market to the trade as we market our own commercial cut.

The condition of the market at the time the bulk purchase is made would naturally have quite an effect on the difference between selling a stock in bulk and selling individual cars of lumber; if all grades were moving in proportion or without any resistance the bulk sale would move in better conformity than [319—213] it would when there were only certain items in demand on the market. I hardly see, off hand, why the car shortage should affect one much more than the other. The prices for carload lots, loaded on cars, is open at once, if you have the cars. If you don't get it on the car you don't sell it, but that would have a bearing, I think, on either method of selling, possibly more on the bulk sale through which you have to depend entirely on future car supply. A stable market would be the ideal market, or the advancing market would be the ideal market to dispose of a bulk purchase, of course. An increase in freight rates, the exact amount of which is not definitely known, but which was anticipated, would also have an effect on the market in case of a bulk purchase, providing you were not in position to make shipments before

(Testimony of W. C. Lubrecht.)

the rates would go into effect; it might have some bearing. And the ability to plane and load the lumber on cars within a specified length of time, you have to load the stock to reach your customers.

Witness excused.

**Testimony of C. H. Richardson, for Plaintiffs (Recalled in Rebuttal).**

C. H. RICHARDSON, a witness recalled on behalf of the plaintiffs in rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

I am the same C. H. Richardson who testified before. We handle in our plant from 20 to 25 million feet of lumber in the course of a year. I will say that the difference between the market price or highest market price of a lumber yard sold as was described to me the other day, of approximately three million feet, if it is sold by car lots or open lots or in bulk, during the period from May first to October first, 1920, is between five and six dollars. [320—214]

I do not know of any custom in this country, where the sale of lumber is made upon transit order, that the seller sustains the demurrage charges; I never heard of such a custom; we have no such practice in our establishment.

As to the market for lumber, either after February, 1920, or after August first, I would say that the best month we had was August, and the next best month was September. I don't think there any variation in our prices between June first and Sep-

(Testimony of C. H. Richardson.)

tember first or October first or until about the 4th or 5th of October.

I am acquainted with the Weyerhaeuser basic price list. It is not a matter of compulsion and necessity that lumber dealers, such as we, have to meet that list; to meet the competition, is all. My recollection is that they raised their prices in the early part of February; in the latter part of February they reduced it. I couldn't say as to whether the point to which they reduced it was any greater than what the original price was before they raised it; I have no recollection. I think they largely reduced more on the common lumber than on the finishing lumber. There was no variation in our price between May first and October first. We could not entirely supply the demand during that period; we were way behind in our orders all the time.

Cross-examination by Mr. POPE.

We never have sold lumber in transit. I understand it is, however, done sometimes. Assuming that I or some other person should start a car consigned to Alliance, Nebraska, before it was sold, and after the car has reached that destination a demurrage has accrued on it, and the car should be sold to some purchaser, I wouldn't say in that case the seller should [321—215] pay the demurrage. I don't know who would; I wouldn't sell lumber that way; haven't done it in 20 years; never sold a car in transit since we have been in business. In case that were actually done and the lumber was sold after the demurrage had accrued, I should say

(Testimony of C. H. Richardson.)

that the demurrage would not necessarily be paid by the seller. I should say not, if he sold it at a fixed price delivered at the customer's point. I don't know who would pay it. I don't know where the seller would get off if the car laid there for a year, say. Assuming that it laid there a week it would be the same proposition. I am not able to give you any information on that; I have never had any experience with that transit business.

Witness excused.

**Testimony of Reuben Dwight, for Plaintiffs (In Rebuttal).**

REUBEN DWIGHT, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is Reuben Dwight; I live at Perma and have lived there for eight years. I have held the office of State Senator in my county. I am in the mercantile business at Perma at the present time. I know Ed. Love, and knew him during his residence there. I know his general reputation for truth and veracity in the community in which he lives. It was bad.

Witness excused.



**Testimony of R. R. Hoyt, for Plaintiffs (Recalled in Rebuttal).**

R. R. HOYT, a witness recalled by the plaintiffs for further rebuttal, testified as follows:

Direct Examination by Mr. PARSONS.

[322—216]

I live at Thompson Falls, and have been up on the Reservation. I knew Ed. Love during his period of residence on the Reservation. I am acquainted with his general reputation for truth and veracity in the community in which he lived on the Reservation. It was bad.

Cross-examination by Mr. HALL.

I am not at this time a partner of Senator Donlan; I have been associated with him.

Witness excused.

**Testimony of John Mahoney, for Plaintiffs (In Rebuttal).**

JOHN MAHONEY, a witness called on behalf of the plaintiffs in rebuttal, having been first duly sworn, testified as follows:

Direct Examination by Mr. PARSONS.

My name is John H. Mahoney; I have been in the lumber business out of Missoula for several years. I did not know Ed. Love during his residence in Missoula; I knew him in Sanders County. I am acquainted with his general reputation in the community in which he lived in Sanders County for truth and veracity, during the time I was there. It was bad.

(Testimony of John Mahoney.)

Cross-examination by Mr. HALL.

I never lived there; I had business there; that was in 1913; well, I may say 1913 we lost most of our stock, but I had interests there until 1915.

Witness excused.

Testimony closed. [323—217]

The foregoing is now, by counsel for the plaintiffs in the foregoing entitled action, submitted as the statement of evidence, and is now lodged with the Clerk of the District Court of the United States for the District of Montana, in which court said action was tried.

Dated: this 20th day of January, 1922.

HARRY H. PARSONS,

A. J. VIOLETTE,

Of Missoula, Montana,

M. S. GUNN,

CARL RASCH,

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for the Plaintiffs.

I hereby certify that the foregoing statement and transcript of evidence is a complete, true and correct statement and transcript of all of the evidence adduced at the trial of said cause, and the same is hereby settled, allowed and approved.

Dated this 2d day of Feb., 1922.

BOURQUIN,

Judge.

Filed Feb. 2, 1922. C. R. Garlow, Clerk U. S. District Court, District of Montana. [324—218]

That thereafter, on February 2d, 1922, petition for appeal and order allowing appeal was duly filed and entered herein, being in the words and figures following, to wit: [325]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDER-  
SON, Copartners, Doing Business Under the  
Firm Name and Style of DONLAN & HEN-  
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-  
PANY, a Corporation, of Jackson County,  
Missouri,

Defendant.

**Petition for Order Allowing Appeal.**

To the Honorable GEORGE M. BOURQUIN,  
Judge of the District Court of the United  
States, for the District of Montana:

The above-named plaintiffs, Edward Donlan and Ben W. Henderson, as copartners, doing business under the firm name and style of Donlan and Henderson, deeming themselves aggrieved by the judgment and decree rendered and entered in this cause, on the 22d day of September, 1921, do hereby appeal from the said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit, upon the grounds and for the reasons

specified in their assignment of errors, which is filed herewith, and they pray that this appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings, papers and documents, upon which said judgment and decree were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 2d day of February, 1922.

HARRY H. PARSONS,

A. J. VIOLETTE,

Of Missoula,

M. S. GUNN,

CARL RASCH and

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for Plaintiffs. [326]

The foregoing petition for an order allowing an appeal in said cause is hereby granted and the appeal allowed, upon the plaintiffs giving bond conditioned as required by law in the sum of \$300.00.

Dated this 2d day of February, 1922.

BOURQUIN,

Judge.

Filed Feb. 2, 1922. C. R. Garlow, Clerk. [327]

That thereafter, on February 2d, 1922, assignment of errors was duly filed herein, being in the words and figures following, to wit: [328]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,  
Copartners, Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-  
PANY, a Corporation, of Jackson County,  
Missouri,

Defendant.

**Assignment of Errors.**

Come now the plaintiffs in said above-entitled cause and file this their assignment of errors, upon which they intend and will rely upon their appeal from the judgment and decree made and entered in said cause on the 22d day of September, 1921, to wit:

1. The Court erred in rendering and entering its judgment and decree in favor of the defendant and against the plaintiffs.

2. The Court erred in not rendering and entering a judgment and decree in favor of the plaintiffs and against the defendant, awarding the said



plaintiffs the relief prayed for in their complaint.

3. The Court erred in holding and decreeing that said plaintiffs were not entitled to recover anything upon their complaint in said cause, and that the said complaint, and the causes of action therein stated, should be dismissed.

4. The Court erred in holding and decreeing that there was due from said plaintiffs to defendant the sum of \$18,084.51, with interest thereon from August 10, 1921, and erred in holding and decreeing any sum or any amount to be due and owing from said plaintiffs to said defendant.  
[329]

5. The Court erred in holding and deciding that plaintiffs' right to any sum or amount in excess of the sum of \$20.00 per M. for the lumber burned on August 3, 1920, depended upon a resale by said defendant of said lumber, and that before such resale no money was due said plaintiffs from the defendant and no debt existed.

6. The Court erred in holding and deciding that the defendant's promise to pay for the lumber which was burned on the 3d day of August, 1920, was not absolute, but conditional, and that plaintiffs' right to payment therefor was not vested, but contingent; and in that connection the Court erred in holding and deciding that by the destruction of said lumber the condition of defendant's liability failed, and the contingency upon which such liability of defendant depended did not

happen, and that by reason thereof both the promise of the defendant and the right of the plaintiffs thereupon expired.

7. The Court erred in holding and deciding that on the sale of the lumber by plaintiffs to defendant, and upon the payment of the sum of \$20.00 per M. therefor, the plaintiffs and defendant were and became joint adventurers in respect to any return on a resale thereof by the defendant, and in that connection the Court erred in holding and deciding that the obligations and liabilities of the defendant to the plaintiffs ceased and became extinct upon the happening of the fire and the destruction of the lumber on the 3d day of August, 1920.

8. The Court erred in holding and deciding that there was no duty or obligation on the part of the defendant to market the lumber between the 16th day of April, 1920, the date of the sale of said lumber to defendant, and the 3d day of August, 1920, the date when said lumber was destroyed by fire.

9. The Court erred in failing and refusing to hold and decide that the defendant was liable to the plaintiffs for the [330] difference between the reasonable value of said lumber on the date of said fire, to wit, the 3d day of August, 1920, and the amount of advances and expenses made and incurred by the defendant up to that time.

10. The Court erred in holding and deciding that the defendant was entitled to the whole amount of

the insurance of \$25.00 per M. upon the said lumber, destroyed by said fire on the 3d day of August, 1920, and in denying the plaintiffs the right to any part or portion of said insurance in excess of the sum of \$20.00 per M.

WHEREFORE, plaintiffs pray that the said judgment and decree be reversed and said cause remanded to the District Court of the United States for the District of Montana, for such further proceedings, and the entry of such judgment and decree, as may be commensurate with the rights of the plaintiffs in the premises.

Dated this 2d day of February, 1922.

H. H. PARSONS,

A. J. VIOLETTE,

Of Missoula,

M. S. GUNN,

CARL RASCH and

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for Plaintiffs.

Filed Feb. 2, 1922. C. R. Garlow, Clerk. [331]

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That thereafter, on February 7th, 1922, Bond on Appeal was duly filed herein, being in the words and figures following, to wit: [332]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,  
Copartners, Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Plaintiffs,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-  
PANY, a Corporation, of Jackson, County,  
Missouri,

Defendant.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS:  
That we, Edward Donlan and Ben W. Henderson,  
copartners, doing business under the firm name  
and style of Donlan and Henderson, as principals,  
and United States Fidelity & Guaranty Company,  
a surety company, organized and existing under  
and by virtue of the laws of Maryland, and duly  
licensed and authorized to do business in the State  
of Montana, as Surety, are held and firmly bound  
unto Turner, Dennis and Lowry, a corporation, of  
Jackson County, Missouri, in the full sum of  
Three Hundred Dollars (\$300.00), to be paid to  
said Turner, Dennis and Lowry, of Jackson  
County, Missouri, its successors or assigns, for  
which payment, well and truly to be made, we bind

ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of February, 1922.

WHEREAS, on the 22d day of September, 1921, in the District Court of the United States for the District of Montana, in a suit or action pending therein, wherein the said Edward Donlan and Ben W. Henderson, copartners, doing business under [333] the firm name and style of Donlan and Henderson, were plaintiffs, and the said Turner, Dennis and Lowry Lumber Company, of Jackson County, Missouri, was defendant, a judgment and decree was rendered against the said Edward Donlan and Ben W. Henderson, copartners, doing business under the firm name and style of Donlan and Henderson, and the said Edward Donlan and Ben W. Henderson have petitioned for and obtained an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and have filed the same in the office of the Clerk of the District Court of the United States for the District of Montana, to reverse the said judgment and decree.

NOW, the condition of the above obligation is such that, if the said Edward Donlan and Ben W. Henderson shall prosecute their said appeal to effect, and answer all costs if they fail to make



their appeal good, then the above obligation to be void; otherwise to remain in full force and virtue.

DONLAN & HENDERSON,

By E. DONLAN.

UNITED STATES FIDELITY & GUAR-  
ANTEE COMPANY,

By CLINTON O. PRICE,

Its Attorney in Fact.

[Corporate Seal]

The above appeal bond is hereby approved.

Dated this 7th day of February, 1922.

BOURQUIN,

United States District Judge.

Filed February 7, 1922. C. R. Garlow, Clerk.

[334]

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That thereafter, on February 7th, 1922, citation was duly issued herein, which original citation is hereunto annexed and is in the words and figures following, to wit: [335]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,  
Copartners, Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-  
PANY, a Corporation, of Jackson County,  
Missouri,

Appellee.

**Citation.**

The President of the United States to Turner, Den-  
nis & Lowry Lumber Company, a Corporation,  
of Jackson County, Missouri, the Above  
Named Appellee, and to Messrs. Hall & Pope,  
Its Solicitors and Attorneys, GREETING:

You are hereby cited and admonished to be  
and appear at the United States Circuit Court of  
Appeals for the Ninth Circuit, to be held at the  
City of San Francisco, in the State of California,  
within thirty days from the date hereof, pursuant  
to an order allowing an appeal, and of an appeal  
entered and filed in the office of the clerk of the  
District Court of the United States for the Dis-  
trict of Montana, from a final judgment and de-  
cree entered on the 22d day of September, 1921,

in that certain suit or action wherein Edward Donlan and Ben W. Henderson, copartners, doing business under the firm name and style of Donlan and Henderson, are plaintiffs and appellants, and Turner, Dennis and Lowry Lumber Company, a corporation, of Jackson County, Missouri, is defendant and appellee, to show cause, if any there be, why the said judgment and decree, in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable GEORGE M. BOURQUIN, Judge of the [336] United States District Court for the District of Montana, this 7th day of February, 1922.

BOURQUIN,  
Judge of the United States District Court for the  
District of Montana.

Service of the above and foregoing citation acknowledged, and receipt of copy thereof admitted this 8th day of February, 1922.

HALL & POPE,  
Solicitors and Attorneys for Defendant and Appellee. [337]

[Endorsed]: No. 892. United States District Court, District of Montana. Edward Donlan and Ben W. Henderson, Copartners, Doing Business Under the Firm Name and Style of Donlan and Henderson, Appellants, vs. Turner, Dennis & Lowry Lumber Company, a Corporation, of Jack-

son County, Missouri, Appellee. Citation. Filed Feb. 9, 1922. C. R. Garlow, Clerk. By H. H. Walker, Deputy. [338]

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That thereafter, on February 9th, 1922, a praecipe for transcript of the record was duly filed herein, being in the words and figures following, to wit: [339]

In the District Court of the United States for the  
District of Montana.

EDWARD DONLAN and BEN W. HENDERSON,  
Copartners, Doing Business Under the Firm  
Name and Style of DONLAN AND HEN-  
DERSON,

Appellants,

vs.

TURNER, DENNIS & LOWRY LUMBER COM-  
PANY, a Corporation, of Jackson County,  
Missouri,

Appellee.

**Praecipe for Transcript of Record on Appeal.**

To the Clerk of the Above-entitled Court:

You will please prepare and certify forthwith, transcript of the record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the appeal heretofore perfected to

said court, and include in said transcript the following pleadings, proceedings and papers on file herein, to wit:

The complaint; the amended answer; the plaintiffs' reply; statement of the evidence settled and approved by the Court; memorandum decision of the Court dated August 4, 1921; additional memorandum decision dated September 3, 1921; the judgment and decree dated September 21, 1921, and entered on the 22d day of September, 1921; petition for allowance of an appeal; order allowing appeal; assignment of errors; appeal bond; citation and praecipe for a transcript of the record.

Dated this 7th day of February, 1922.

H. H. PARSONS and

A. J. VIOLETTE,

Of Missoula, and

M. S. GUNN,

CARL RASCH and

E. M. HALL,

Of Helena, Montana,

Solicitors and Attorneys for Plaintiffs and Appellants. [340]

Service of the above and foregoing praecipe acknowledged, and receipt of copy thereof admitted this 8th day of February, 1922.

HALL & POPE,

Solicitors and Attorneys for Defendant and Appellee.

Filed Feb. 9, 1922. C. R. Garlow, Clerk. [341]



**Certificate of Clerk U. S. District Court to Transcript of Record on Appeal.**

United States of America,  
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 341 pages, numbered consecutively from 1 to 341 inclusive, is a full, true and correct transcript of the record and proceedings had in said cause, and of the whole thereof, required to be incorporated in the record on appeal therein by praecipe filed as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of One Hundred Fifty-three and 95/100 Dollars (153.95), and have been paid by the appellants.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 11th day of February, A. D. 1922.

[Seal]

C. R. GARLOW,  
Clerk. [342]

[Endorsed]: No. 3835. United States Circuit Court of Appeals for the Ninth Circuit. Edward Donlan and Ben W. Henderson, Copartners, Doing Business Under the Firm Name and Style of Donlan and Henderson, Appellants, vs. Turner, Dennis & Lowry Lumber Company, a Corporation, of Jackson County, Missouri, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 17, 1922.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.